



Copy 1

**This Book
Does Not
CIRCULATE**


—

—

—

1

BOUND.....MAY 8 1975



Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

No. 73-7

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICTFILED
JUN 26 1974*Walter T. Simmons*
FIFTH DISTRICT OF ILLINOIS
DEPT. APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	St. Clair County.
vs.)	
)	
GEORGE HUNTER,	)	Honorable Alvin H. Maeyes,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

Appellant George Hunter was convicted of burglary upon his plea of guilty in St. Clair County on February 24, 1970. On February 4, 1971, a post-conviction petition was filed pursuant to chapter 38, section 122-1 et seq. Counsel was appointed and an amended petition was filed. In September, 1972, an evidentiary hearing was held at which appellant testified. The petition was denied and an appeal was filed. Counsel on appeal, the Deputy Appellate Defender for the Fifth District, filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1369, 18 L.Ed.2d 493. A copy of the motion was properly served and this court has allowed more than ample time for appellant to file objections. No response has been received.

We have viewed the record and agree with counsel on appeal that no showing of violation of constitutional rights appear. Appellant's appointed counsel fully complied with chapter 110A, section 651(c) in the amendment and prosecution of the post-conviction petition. We therefore grant the motion to withdraw.

Motion granted; Judgment affirmed.

Justice Carter, not participating.

Publish abstract only.

30
S.L.A. 4

FILED
JUL 24 1974

IN THE
FEDERAL COURT OF DISTRICT

FIFTH DISTRICT

Appeal from the Circuit Court of
St. Clair County.

Respondent: John E. Hunter,
Judge Presiding.

REPORT OF THE CLERK OF DISTRICT

St. Clair County.

GEORGE HUNTER,

Respondent-Appellant.

VER CURIAM:

Appellant George Hunter was convicted of robbery upon his plea of guilty in
St. Clair County on January 24, 1971. On January 2, 1971, a post-arrest hearing
was held pursuant to court order 38, section 131-1 of the Illinois Code of
Judicial Administration. In September, 1970, an additional hearing was held at which
appellant testified. The petition was denied and no appeal was taken. On appeal,
the County Appellate Court in the Fifth District filed a motion to withdraw judgment in
People v. Hunter, No. 7-2, 1971, 151 Ill. App. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

We have reviewed the record and agree with counsel on appeal that no error
in violation of constitutional rights appears. Appellant's appeal is hereby denied.
with charges 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Justice Court, not reviewed.

Enrolled clerk's copy.

No. 74-111

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
JUL 18 1974
Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Marion County.
)	
vs.)	
)	
CHARLES STRICKLER,	)	Honorable Raymond O. Horn,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant pled guilty to four charges of burglary in the Circuit Court of Marion County, and was sentenced to four concurrent terms of two to ten years.

Among his contentions on appeal is that no inquiry was made regarding the voluntariness of the plea, as required by Supreme Court Rule 402(b). The record shows this contention to be correct, and makes it unnecessary to pursue the other allegations of error.

For the foregoing reason the judgment of the trial court is reversed and the cause is remanded to the circuit court with directions that the defendant be allowed to plead anew.

Reversed and remanded with directions.

Justice Crebs not participating.

PUBLISH ABSTRACT ONLY.

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)

vs.)

MITCHELL WHITE (Impleaded),)
Defendant-Appellant.)

Since defendant does not challenge the sufficiency of the evidence against him, the facts as adduced at trial may be summarized. On March 14, 1973, at 7:00 A.M., the complaining witness left her third-floor apartment at 113 N. Lamon, Chicago, Illinois. At that time all her doors and windows were locked and intact. At approximately 2:15 P.M., a neighbor on the second floor heard someone walking in the complainant's apartment and telephoned the police. Two police officers responded to the call and, upon their entry into the apartment of the complainant, they observed the defendant and a second man in the bedroom wrapping a cord around a television set and a clock radio. The entire apartment had been ransacked. There were bundles of clothing on the bed and the floor of the apartment. The door jamb on the rear door of the apartment

had been partly ripped away.

Defendant's only argument on appeal is that his sentence of two to six years is excessive and should be reduced. While this court has the power to reduce sentences (Ill.Rev.Stat. 1971, ch. 110A, par. 615(b)), that power should be exercised with care and only where it is manifest in the record that the sentence is excessive. People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720; People v. Conway, 3 Ill.App.3d 69, 278 N.E.2d 852. The trial judge who heard the testimony and matters presented in aggravation and mitigation is ordinarily in a better position than a reviewing court to determine the punishment to be imposed. People v. Winfield, 133 Ill.App.3d 48, 272 N.E.2d 848.

In the case at bar, the pre-sentence investigation and the hearing in aggravation and mitigation revealed that the defendant had three prior misdemeanor convictions and was on probation at the time he was arrested in this case. The sentence imposed upon the defendant was within the statutory limits for the crime of burglary. A review of the facts adduced at trial and defendant's prior record demonstrate that the sentence imposed by the trial judge was proper.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

THIRD DIVISION: Judge Mejda did not participate.

1/3/14

3rd

div

110 previous



30
21 I.A. 117

NO. 59301

SANDRA A. KOHN,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellant,	)	COOK COUNTY
)	
vs.)	
)	
CHARLES W. KOHN,	)	HONORABLE
	)	DAVID LINN,
Defendant-Appellee.	)	PRESIDING.

PER CURIAM:

The plaintiff, Sandra A. Kohn, appealed from an order which denied her petition for a rule to show cause why the defendant should not be held in contempt of court for failure to fully pay child support as provided in the divorce decree and which also allowed the defendant's petition to reduce the payments for the support of the three minor children.

On appeal the plaintiff contends that the trial court erred in reducing the payments for support of the three minor children; that the physical filing (i.e. the actual filing in the Clerk's office accompanied by the filing fee) of the petition for modification of child support is a condition precedent to the trial court reducing payments for child support; and that the defendant was barred from obtaining a reduction of child support because he was then in default in child support payments.

On June 18, 1971, a decree for divorce was entered which provided, in part, that the defendant shall pay \$315 a month for support of the three minor children and that the defendant maintain medical insurance for the children.

On March 6, 1973, the plaintiff filed a petition for a rule to show cause, alleging that the defendant was \$284.32 in arrears for child support as of February 28, 1973; and that he failed to maintain medical insurance for the minor children as provided in the decree for divorce. Although

there is no order or notice in the record, a hearing was held on March 13, 1973. At this hearing the defendant presented a petition for modification of the divorce decree, alleging that pursuant to the decree for divorce he was required to pay the sum of \$315 a month as child support based upon his net take home pay of \$705 a month; that he was unemployed and without sufficient funds to support and maintain himself and without income to provide for the support of his children and prayed that an order be entered temporarily abating child support or for such other order as in equity would be just. Although the common law record shows that this petition was not physically filed and the filing fee was not paid until July 10, 1973, the transcript indicates that the attorney for the plaintiff received a copy of the petition prior to the March 13, 1973 hearing.

On March 13, 1973, the plaintiff filed an answer to defendant's petition, alleging that the defendant "terminated his position as a Lyons Police Officer in order to portray the role of 'Smiling Jack, Aviator Extra Ordinare' and thus his unemployment, if any, is due to his voluntary [sic] pursuing a 'hobby' to the detriment of the economic welfare of his three minor children."

At the March 13, 1973, hearing it was disclosed that the defendant had left the Lyons Police Department on August 31, 1972, at the request of his present wife and "after having a serious automobile accident on an armed robbery case"; that he was unable to work in a manual job such as a mechanic, which he had done previously, due to a history of herniated discs; and that he had sought employment in the airline field because he had a pilot's license.

After leaving the Lyons Police Department the defendant went to work for Lease-A-Plane, Inc. at a \$90 a month reduction

in salary, but continued to pay the same child support. This company was sold on January 8, 1973, and the defendant lost his employment. The record discloses that the defendant had a one-quarter interest in an airplane which cost him \$1,200 and which costs \$25 a month to maintain. The defendant further stated he did not carry medical insurance for the three children, although required to do so by court order.

The plaintiff testified that it cost approximately \$660 a month to maintain the three children; that she worked part time as a registered nurse and her take home pay was about \$100 a week; and that she will have to be hospitalized for surgery and will be unable to work for a minimum of six weeks.

At the close of the March 13, 1973, hearing, the trial court told the defendant he was not going to send him to jail that day; that he was going to give the defendant 30 days to work out the arrearage and to "get some meaningful job"; that he is sympathetic with the defendant and defendant should be permitted to do the work for which he is best suited, and that the children must be provided for, but it would not solve the problem to send the defendant to jail. The court entered the plaintiff's petition for rule to show cause, the defendant's petition for reduction in child support and plaintiff's answer to defendant's petition. The matter was continued to April 16, 1973, and then to May 10, 1973.

At the May 10, 1973, hearing the defendant testified that he was working as a freight mail pilot for Central Air Lines at a net salary of approximately \$150 a week, with increases to \$750 a month within six months, to \$900 a month within one year, and to \$950 a month after one year and nine months. As a part of the job, he must stay in Omaha, Nebraska, every other day and every other weekend (hence about 15 days each month). When he is in Omaha, the employer pays for his room,

but the defendant must pay for his food, which he estimated to be \$90 a month.

The plaintiff testified that she was not currently employed and had not worked since March 26, 1973, when she was hospitalized for surgery.

At the May 10, 1973 hearing the trial court found that the defendant "used due diligence to try to get employment" since March 13, 1973, as well as prior thereto; that he was not "trying to avoid getting a job in order to avoid paying support for his children"; and the defendant was entitled to a reduction in payments for child support.

On June 8, 1973, the trial court entered an order modifying the child support provisions of the divorce decree and providing, in part, (1) that the child support for the three minor children be reduced retroactive to March 13, 1973, from \$315 per month, based upon the defendant's take home of \$705 per month, to forty per cent (40%) of the defendant's net income, less the unreimbursed expenses incurred by defendant in the scope of his employment, including the full cost of any meals; (2) that the defendant furnish the plaintiff a copy of his pay statement, together with a statement of the unreimbursed employment expenses he paid for the said pay period, together with his receipts for such expense payments; and (3) that, as of May 10, 1973, and based upon the retroactivity of the reduction of the child support payments to March 13, 1973, the defendant was in arrears \$337 and the defendant shall pay to the plaintiff an additional ten per cent (10%) of his net income until the arrearage had been paid.

The plaintiff contends that it was error for the trial court to find that there was such a change in circumstances as to justify the reduction in child support from \$315 a month to forty per cent (40%) of the defendant's net salary less the

"unreimbursed expenses incurred by the defendant in the scope of his employment including the full cost of any meals." The plaintiff also argues that the defendant should not have resigned his position as a police officer to follow his desire to be an aviation pilot.

Section 18 of the Divorce Act (Ill. Rev. Stat. 1971, ch. 40, par. 19) provides, in part, as follows:

"The court may, on application, from time to time, terminate or make such alterations in the allowance of alimony and maintenance, and the care, education, custody and support of the children, as shall appear reasonable and proper."

The modification of provisions for the payment of alimony and child support rests in the sound discretion of the court, and a reviewing court will not interfere with the exercise of such discretion in the absence of its abuse.

Scalfaro v. Scalfaro, 123 Ill. App. 2d 23, 259 N.E. 2d 644;
Edwards v. Edwards, 125 Ill. App. 2d 91, 259 N.E. 2d 820;
Lewis v. Lewis, 120 Ill. App. 2d 263, 256 N.E. 2d 660.

A voluntary change in occupation or employment made in good faith may constitute a material change in circumstances sufficient to warrant a modification of child support payments.

Martinec v. Martinec, ___ Ill. App. 3d ___, ___ N.E. 2d ___,
 Appellate Court No. 59085, opinion 1-25-74; Nelson v. Nelson,

225 Ore. 257, 357 P.2d 536. A divorce decree does not freeze a father in his employment. One may in good faith make an

occupational change even though that change may reduce his ability to meet his financial obligations to his children.

The courts are to take into consideration not only the circumstances of the children, but that of the father as well.

Ordinarily, a man makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together, the standard of living of the children rises or falls with the changes of the father's fortunes.

Surely, this readjustment should be no different because divorce has separated them physically, unless the move was made to avoid responsibility or made in bad faith.

Martinec v. Martinec, ___ Ill. App. 3d ___, ___ N.E. 2d ___, Appellate Court No. 59085, opinion 1-25-74; Fogel v. Fogel, 184 Neb. 425, 168 N.W. 2d 275.

In the order of June 8, 1973, the trial court found "that the Defendant had exercised due diligence both prior to and subsequent to March 13, 1973, to secure reasonable employment and that the allegation of due diligence in Defendant's motion to reduce the child support payments for the parties' three (3) minor children, said motion being filed on March 13, 1973, is supported by the evidence presented before this Court on March 13, 1973, and on May 10, 1973." These determinations, together with the finding that the financial condition of the defendant had sufficiently changed since the entry of the divorce decree to warrant its modification, were not an abuse of discretion by the trial court. Scalfaro v. Scalfaro, 123 Ill. App. 2d 23, 259 N.E. 2d 644.

Although it appears that the trial court made inconsistent statements at the March 13th and May 10th hearings, a reading of the entire record indicates that the action of the trial court was reasonable. At the March 13th hearing the defendant had left the Lyons Police Department and was unemployed. The trial court stated that it would not provide child support if the defendant was sent to jail. Therefore, the trial court ordered the defendant to secure gainful employment and attempt to sell his interest in the airplane. At the time of the May 10th hearing the defendant was gainfully employed but was unable to sell his interest in the airplane. Under these circumstances, the finding of the trial court on May 10th,

1973, that the defendant "used due diligence to try to get employment" and that he was not "trying to avoid getting a job in order to avoid paying support for his children" was supported by the record.

Under the facts in the case at bar, the defendant had a right to terminate his employment as a Lyons Police Officer and seek employment as an aviation pilot, even though it resulted in a reduction in child support payments for the three minor children.

The plaintiff also contends that the discretion of the trial court is limited to the issues pleaded; that in the case at bar the defendant's petition for modification of child support was not physically filed of record until July 10, 1973, and that, therefore, the trial court did not have jurisdiction on June 8, 1973, to reduce the child support payments. However, the record affirmatively shows that the petition was served on counsel for the plaintiff prior to March 13, 1973, and that the plaintiff filed an answer to said petition on March 13, 1973. Also, at the May 10, 1973, hearing counsel for the plaintiff stated that a "motion for a reduction of child support was filed back on March 13th." Further, the trial court found that the "motion to reduce the child support payments" was filed on March 13, 1973. It is therefore apparent that plaintiff and the trial court had the petition for modification of child support payments in their possession on March 13, 1973. In fact, counsel for plaintiff admits that he did not know the petition for modification had not been physically filed on March 13, 1973, until after the Notice of Appeal and Praecipe for Record had been filed. In light of the foregoing, the plaintiff was not harmed or prejudiced by the fact that the petition for modification of child support was not physically filed of record until July 10, 1973. Therefore, the plaintiff's contention that the trial court did not have jurisdiction to entertain the

motion for modification of child support on March 13, 1973, because the petition was not physically filed of record until July 10, 1973, is without merit.

The plaintiff further argues that "installments of child support accruing before a petition for modification is filed are vested" and, therefore, since the petition for modification was not physically filed until July 10, 1973, the trial court was without jurisdiction to provide that the modification of child support should be retroactive to March 13, 1973. The plaintiff rightly argues that the installments of child support accruing before a petition for modification is filed are vested. Needler v. Needler, 131 Ill. App. 2d 11, 22, 268 N.E. 2d 517; Gregory v. Gregory, 52 Ill. App. 2d 262, 202 N.E. 2d 139. However, the record clearly shows that the petition for modification was before the trial court on March 13, 1973, and, therefore, the trial court did not err in ordering the reduction in child support payments to be retroactive to March 13, 1973.

The plaintiff further argues that the petition for modification of child support should have been denied because the defendant was in default and, therefore, came before the court with "unclean hands." Although the defendant was \$419 in arrears on March 13, 1973, and \$337 in arrears on June 8, 1973, the trial court found that the defendant used due diligence to try to get employment and had not "been malingering in trying to avoid getting a job in order to avoid paying support for his children." Under such circumstances, it cannot be said that the defendant came into court with "unclean hands."

In Edwards v. Edwards, 125 Ill. App. 2d 91, 259 N.E. 2d 820, the court, in discussing the discretion of the trial court in altering an order respecting support payments, said (125 Ill. App. 2d, p. 95):

"It is also well-established that the alteration of an order respecting support payments rests in the sound judicial discretion of the trial court, and unless the record shows an abuse of that discretion

such an order will generally not be disturbed on review."

The court, in discussing the fact that a default in support payments existed, said (125 Ill. App. 2d, p. 96):

"While equity does not look with favor on modifying a support decree when the petitioner is in default of compliance with the order then in effect, it will not deny a petition to modify for that reason only, but will consider the whole situation on its merits. Wiseman v. Wiseman, 290 Ill. App. 535, 8 N.E. 2d 960 (4th Dist. 1937). The default of plaintiff in this case appears small and of short duration. We find nothing in the evidence here to justify finding that plaintiff's failure to pay the full support payments previously ordered constituted a 'contumacious refusal to pay,' as defendant contends."

Also see Daum v. Daum, 11 Ill. App. 3d 245, 249, 296 N.E. 2d 614.

Likewise, in the case at bar the record does not disclose that the defendant's "failure to pay the full support payments previously ordered constituted a contumacious refusal to pay" or that defendant came into court with "unclean hands."

The trial court did not abuse its discretion in modifying the provision for child support and, therefore, the order will not be disturbed on review.

The order of the trial court is affirmed.

Order affirmed.

Second Division.

Stamos, J., not participating.

Publish abstract only.

3D
21 I.A. 119



58448

MIKE MALLERDINO,

)
)
) Plaintiff-Appellant,)

vs.

)
) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
)

JOSEPH POLLINA and
ROSE POLLINA,

) HONORABLE NATHAN M. COHEN,
) Presiding.
)

)
) Defendants-Appellees.)

PER CURIAM* (SECOND DIVISION, FIRST DISTRICT):

Action was instituted by Mike Mallerdino, plaintiff, to foreclose on a note and trust deed executed by defendants Joseph Pollina and Rose Pollina, his wife, secured by residential real estate in which defendants had a beneficial interest. All matters relating to the foreclosure action were brought to a satisfactory conclusion with the exception of the amount of fees to be awarded to plaintiff's counsel; the terms of the trust deed provided that plaintiff's attorney's fees were to be awarded to plaintiff as costs. Plaintiff appeals from an order awarding as costs to plaintiff an amount of attorney's fees substantially less than requested by his counsel. Plaintiff contends that the trial court improperly ignored his attorney's submitted schedule of time and fees and the customary fees charged by the bar for like services, while fixing the fees at the "arbitrary" figure suggested by defendants.

The order of the trial court appealed from recites that a hearing was held on the question of attorney's fees and that the court was fully advised in the premises. The awarding of attorney's fees rests within the sound discretion of the trial court; in the absence of a clear abuse of that discretion, the reviewing court will not interfere with that determination. (Hofing v. Willis, 83 Ill.App.2d 384, 389, 227 N.E.2d 797.) Guidelines to be considered by the court in arriving at that determination are contained in Canon 12 of the American Bar Association Canons of Ethics. (See

* HAYES, P.J., STAMOS and LEIGHTON, JJ., participating.

Central Standard Life Insurance Co. v. Gardner, 36 Ill.App.2d 292, 304, 183 N.E.2d 881. Implicit in such determination is the necessity that evidence be introduced and considered in support of a requested fee.

The instant order was entered after the court was fully advised in the premises, and, although plaintiff sought and received additional time within which to file a report of proceedings on this appeal, the record does not include such report of proceedings. Absent the filing of a report of proceedings to support his position that the court acted arbitrarily in fixing the attorney's fee, which was plaintiff's burden as the appellant in the instant appeal, this court will presume that the trial court heard proper and sufficient evidence upon which to have based its ruling. Perez v. Janota, 107 Ill.App.2d 90, 246 N.E.2d 42.

Plaintiff impliedly argues in his reply brief that the filing of a report of proceedings was unnecessary since the instant record, as it stands, demonstrates that the award of fees by the trial court was arbitrary. Overlooked in this argument is the fact that such report of proceedings may well have demonstrated that plaintiff was unable to establish the amount of fees requested and that defendants' challenge to portions of that claim was accepted by the trial court.

For these reasons, the order appealed from of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

1-8-74.
20 km
2nd Div



59823

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
MORRIS HICKS,	)	HONORABLE
	)	JOSEPH A. POWER,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Morris Hicks, petitioner, appeals the dismissal of his pro se post-conviction petition filed under the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq), without an evidentiary hearing.

Petitioner was originally charged by indictment with the crime of murder. On October 30, 1967, after a jury trial, petitioner was found guilty and was sentenced to a term of 20 to 50 years. Subsequently, the petitioner filed a pro se post-conviction petition which was dismissed without an evidentiary hearing. Petitioner appealed both his conviction and the dismissal of his post-conviction petition. On March 24, 1970, the Supreme Court affirmed both judgments. (People v. Hicks, 44 Ill. 2d 550, 256 N.E. 2d 823.) On May 26, 1972, petitioner filed the present pro se post-conviction petition. Upon motion of the State, petitioner's pro se post-conviction petition was dismissed without an evidentiary hearing on November 14, 1972.

Petitioner wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states in effect that an appeal in this case would be wholly frivolous and without merit. Petitioner was mailed copies of the motion and brief on March 14, 1974. He was

informed that he had until June 3, 1974, to file any additional points he might choose in support of his appeal. He has not responded.

The motion and brief of the public defender allege that the only possible argument which could be made on appeal is whether petitioner's pro se post-conviction petition was properly dismissed without an evidentiary hearing. Petitioner, in his pro se post-conviction petition, argues (1) that the indictment under which he was tried was invalid because it was not signed by the foreman of the grand jury, (2) that he was denied equal protection of the laws when the judge before whom his indictment was returned did not examine it to determine its authenticity, and (3) that the evidence is insufficient to establish his guilt beyond a reasonable doubt.

The Illinois Post-Conviction Hearing Act provides that "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived" (Ill. Rev. Stat. 1971, ch. 38, par. 122-3). The basis of this section is that granting to a defendant of one complete opportunity to show a substantial denial of his constitutional rights fully satisfies the fundamentals of due process. People v. Polansky, 39 Ill. 2d 84, 233 N.E. 2d 374.

In the case at bar, defendant filed an original post-conviction petition which was dismissed. Petitioner appealed and the Supreme Court affirmed that dismissal. (People v. Hicks, 44 Ill. 2d 550, 256 N.E. 2d 823.) Under these circumstances, the dismissal of petitioner's second post-conviction petition without an evidentiary hearing was proper. People v. Richeson, 50 Ill. 2d 46, 277 N.E. 2d 134.

Even if we were to consider the allegations of petitioner's present post-conviction petition on their merits, the petition was still properly dismissed by the trial court. Petitioner's

first two allegations are that the indictment upon which he was tried was invalid because it was not signed by the foreman of the grand jury and that the chief judge to whom the indictment was returned erred in failing to determine the authenticity of the indictment. At the hearing on the State's motion to dismiss the present post-conviction petition, defense counsel stated:

"As I advised the petitioner and I would at this time advise the court, the original indictment which is contained in the indictment binder in the vault of the clerk of the circuit court is in fact signed by the foreman, although the copy the petitioner received was not in fact signed."

Since the original indictment filed against defendant was in fact signed by the foreman of the grand jury, petitioner's first two arguments are clearly without merit.

Petitioner's third allegation in his present post-conviction petition was that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Our Supreme Court has held that "questions as to the sufficiency of the evidence have been held not to present a constitutional question and therefore are not properly considered in post-conviction proceedings." (People v. Dunn, 52 Ill. 2d 400, 288 N.E. 2d 463.) Petitioner's argument that the evidence was insufficient to establish his guilt beyond a reasonable doubt did not present a constitutional question and the trial court properly dismissed petitioner's post-conviction petition without an evidentiary hearing.

After a full examination of all the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that the point thus raised is not arguable on its merits and that an appeal is wholly frivolous. Our independent examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the public defender of Cook County is

granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed; judgment affirmed.

EGAN, P.J., did not participate.

72-136

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
July 23, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

JUL 11 1968

LOREN L. GLOTTZ, Clerk pro tem
Appellate Court, and District
Abstract

No. 72 136

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

IN THE MATTER OF THE APPLICATION OF)
THE PEOPLE EX REL CAL SKINNER, JR.,)
COUNTY COLLECTOR, OF McHENRY COUNTY,)
Illinois,)
)
Plaintiff-Appellant,)
)
v.)
)
CHICAGO AND NORTHWESTERN RAILWAY)
COMPANY; CHICAGO, MILWAUKEE, ST.)
PAUL AND PACIFIC RAILWAY; ADMIRAL)
CORPORATION, ET AL.,)
)
Defendant-Appellees.)

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from a judgment of the Circuit Court of McHenry County sustaining objections to the 1968 tax levy of the City of Harvard.

On July 1, 1968 the municipal authorities of Harvard adopted the annual appropriation ordinance for the ensuing fiscal year. Subsequently, but on the same date, they adopted the tax levy ordinance establishing a levy of \$360,612 for all corporate purposes. The appropriation ordinance was published on July 11, 1968.

It is contended by the appellees (Chicago and Northwestern Railway Company and Admiral Corporation) that the levy never became effective because it was passed before an interval of ten days had elapsed after the publication of the appropriation ordinance. Section 1-2-4 of the Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 1-2-4) provides as follows:

"§ 1-2-4. Publication of ordinance--Effective date

All ordinances of cities, villages and incorporated towns imposing any fine, penalty, im-

prisonment, or forfeiture, or making any appropriation, shall (1) be printed in book or pamphlet form, published by authority of the corporate authorities, or (2) be published at least once, within 10 days after passage, in one or more newspapers published in the municipality, or if no newspaper is published therein, then in one or more newspapers with a general circulation within the municipality. In municipalities with less than 500 population in which no newspaper is published, publication may instead be made by posting a notice in 3 prominent places within the municipality. No such ordinance shall take effect until 10 days after it is so published, except that an ordinance imposing a municipal retailers' occupation tax adopted under Section 8-11-1, or effecting a change in the rate thereof shall take effect on the first day of the month next following the expiration of the 10 day publication period. . . ."

This language is clear and unequivocal and has been construed by our Supreme Court in a number of cases. Perhaps the definitive case on the exact point is People ex rel. Larson v. Thompson (1941), 377 Ill. 104. That case involved the passage of a levy ordinance by a forest preserve district. The ordinance appropriating the amount needed was passed on July 8, 1939. On September 8, 1939, the appropriation ordinance was published and on September 15, 1939, the district passed its ordinance levying taxes pursuant to the appropriation ordinance. It was contended by the taxpayer that the levy was void because ten days had not elapsed between the date of publication of the appropriation ordinance and the passage of the levy ordinance. The forest preserve district took the position that the requirement of publication of the appropriation ordinance ten days before the passage of the levy ordinance was only directory. They also relied upon a special curative act of the legislature designed to cure the particular defect, validating the taxes levied "notwithstanding the publication of the appropriation ordinance occurred more than ten days after its passage, and notwithstanding

that the tax levy ordinance was passed within ten days after the publication of the appropriation ordinance'." (377 Ill. at 111-112.)

The Supreme Court, in discussing the contention of the taxing body that the language of the statute was only directory, distinguished between those instances in which the time specified does not go to the power of the person or corporation to do the act and is therefore not jurisdictional and those cases where the nature of the act or the language used by the legislature shows that the period of time designated was intended to be a limitation on the power to act. In the case of a tax levy, the court said, the period of time between the publication of the appropriation ordinance and the passage of the levy, is for the protection of the public, to give notice of the appropriation. Being required for the protection of the public the ten day interval between publication of the one ordinance and the passage of the other, is jurisdictional and cannot be waived or cured by subsequent legislation. The appropriation ordinance was not in force until ten days after it was published, therefore the levy ordinance was passed at a time when there was no valid appropriation ordinance in effect and the levy was therefore void. To the same effect is the earlier case of People ex rel. Sullivan v. Florville (1904), 207 Ill. 79, and the subsequent case of People ex rel. Franklin v. Wabash R.R. Co. (1944), 387 Ill. 450.

The County contends, however, that even though the ruling in Thompson is clear and definite, it is a strained construction not necessary to the fundamental intent of the legislature. The County says that the phrase in Section 8-3-1 of the Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 8-3-1) "the corporate authorities shall ascertain the total amount of appropriations legally made for all corporate purposes" should

not be construed so as to require publication ten days before the levy in order for the appropriation to be "legally made" but rather should be construed as referring to the legality of the purposes for which the individual amount is appropriated. In other words, they contend the phrase "appropriations legally made" refers to the propriety of the appropriations and does not contemplate technical procedures such as publication.

This contention, however, ignores the basic reason for the requirement of publication--which is to inform the public. Only on being informed can the taxpayers decide upon the legality or propriety of the appropriations. Whether or not the phrase in question may properly be construed as contended by the County, the requirement of prior publication has not been done away with but still remains as a basic preliminary step in levying a tax.

Acknowledging the overwhelming weight of precedent against it, but seeking to vindicate its position, despite the Supreme Court cases holding otherwise, the appellant urges that under the 1970 Illinois Constitution, the Supreme Court no longer has mandatory jurisdiction of revenue matters, but takes jurisdiction in its discretion. Appellant further argues that this leaves the appellate courts as courts of last resort where the Supreme Court does not assert its latent jurisdiction and that under such circumstances it would not be inappropriate for this court to hold contrary to Supreme Court cases previously cited.

While the logic of this course of action may be apparent to the appellant, it is not so obvious to us. The cases in question, Florville, Thompson and Wabash R.R. were all decided by the Supreme Court after thorough and conscientious consideration of the questions involved and the necessity for protecting the

public. They were far from hasty opinions and were based on grounds of public policy. They are and have been the law of this State on the point over a long period of time. The Supreme Court is not precluded by the 1970 Constitution from considering the matter again if it chooses to do so. This court, feeling that the rule in question is based on a sound principle of public policy, is not inclined to such innovation, either of substance or procedure, as the appellant suggests.

We hold that on the basis of Florville, Thompson and Wabash R.R. and our interpretation of sections 1-2-4 and 8-3-1 of the Municipal Code the judgment of the trial court should be affirmed.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.

73-439

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable GLENN K. SEIDENFELD, Justice
 Honorable L. L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
July 22, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:



of the court. The petition alleged that: (1) on February 6, 1973, Helen Smeskal and Claire Fencel (sisters of the decedent and of the appellant) filed a petition with the probate court pursuant to Section 187(a) of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, §187(a)) whereby they sought to recover from the executor certain items inventoried in their brother's estate (their petition stated that they and their two brothers, appellant herein and decedent, were co-trustees and co-beneficiaries under a trust agreement known as Trust No. 4560 but that during his lifetime the decedent had sold the trust property and invested the proceeds which are traceable to his estate); (2) appellant was not joined as a party to his sisters' petition; (3) appellant did, however, through his attorney, appear in the DuPage County probate proceeding of his brother's estate; and (4) on October 16, 1973, appellant filed a suit (No. 73 ch 6251) in the circuit court of Cook County whereby he, as trustee of Trust No. 4560, sought to recover for himself and his two sisters their respective interests in property purchased with the proceeds of Trust No. 4560 and held by the decedent.

The executor's petition further stated that because the subject matter and relief sought in appellant's suit is basically the same as that petitioned for by appellant's sisters, the estate should not be subject to the expense of litigating the same questions and issues in two separate actions with the risk of conflicting judgments. The executor concluded by pointing out that the sisters' petition was a prior pending action to that which appellant filed in Cook County and he prayed for the instructions of the court.

As can be seen, the petition failed to include the necessary allegations that the petitioner was without an adequate remedy at law and that he was about to suffer irreparable damages. Further, the



petition did not pray for the issuance of an injunction. At the hearing, petitioner did not move for an injunction and no evidence was presented on the issue. The court, sua sponte, enjoined the appellant from proceeding further in the two Cook County cases, No. 73 ch 6251 (referred to in the petition) and No. 72-L 17686 (not found in any pleading). This we hold to be error. See The Vendo Co. v. Stoner, 105 Ill. App. 2d 261, 293 (1969); City Nat. Bank & Trust Co. v. Davis Hotel Corp., 280 Ill.^{App.} 247, 250 (1935).

Because of the foregoing, we reverse the injunction issued herein and remand the cause for further proceedings.

Reversed and remanded .

SEIDENFELD, RECHENMACHER, J.J. - concur



PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

FELIX WALLS,

Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HONORABLE
THOMAS P. CAWLEY,
PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

Defendant was indicted for the offense of theft under complaint No. 72 MC1 J864714. In a bench trial before the Honorable Thomas P. Cawley, he was found guilty and sentenced to a term of six months in the House of Corrections. Appellant filed his notice of appeal on November 21, 1972, and the public defender of Cook County was appointed to represent him.

On March 14, 1974, the public defender filed a motion in this court for leave to withdraw as counsel, pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396. The public defender represents that he has examined the record and finds no meritorious point that could possibly succeed. The motion and brief allege that the only possible basis for an appeal is whether the identification of the defendant by the complaining witness was sufficient to establish guilt beyond a reasonable doubt.

In support of his petition, the public defender argues that the well settled rule in Illinois is that the testimony of a single witness, if positive and credible, is sufficient to convict even if the witness is contradicted by the accused and alibi witnesses. (People v. Turner (1970), 121 Ill. App. 2d 205, 257 N.E. 2d 186; People v. Renallo (1951) 410 Ill. 372, 102 N.E. 2d 116.) In criminal cases where a jury is waived, the credibility of the witnesses and weight to be accorded to their testimony are matters to be determined by the trial judge, and the finding of the trial court will not be disturbed on review unless the evidence is so improbable or unreasonable as to create a reasonable doubt of the

defendant's guilt. People v. Arroyo (1974), 18 Ill. App. 3d 187, 309 N.E. 2d 804; People v. Rush (1970), 126 Ill. App. 2d 136, 261 N.E. 2d 526; People v. Holt (1970), 124 Ill. App. 2d 198, 260 N.E. 2d 291.

Copies of the public defender's motion and brief were mailed to the defendant on March 7, 1974. On March 13, 1974, this court advised defendant that he had until May 12, 1974 to file any points in support of his appeal, after which date the court would make a full examination of all proceedings and dispose of the case. The defendant has neither obtained new counsel nor filed any briefs in support of his appeal.

After carefully reviewing the record, we concur in the opinion of the public defender that the argument raised does not have substantial merit. We find no additional grounds for appeal which are not frivolous. Therefore, the motion of the public defender for leave to withdraw as counsel is granted and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

ADESKO, P.J. and DIERINGER, J., concur.



PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

AL C. BENNETT,

Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

HONORABLE
THOMAS P. CAWLEY,
PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

Defendant was charged with the offense of theft under complaint No. 72 MC1 J864715. In a bench trial before the Honorable Thomas P. Cawley, he was found guilty and sentenced to a term of six months in the House of Corrections.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender of Cook County has filed a motion in this court for leave to withdraw as counsel on appeal. The motion is supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396. Copies of the petition and brief were mailed to defendant on March 7, 1974. The public defender represents that he has examined the record and finds no meritorious points that could possibly succeed on appeal.

On March 13, 1974, this court advised defendant that he had until May 12, 1974 to file any additional points he might choose in support of his appeal. He has not responded.

We have examined the record and concur in the opinion of the public defender that the record is devoid of any additional grounds for appeal that are meritorious. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

ADESKO, P.J. and DIERINGER, J., concur.



58199

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
vs.)
)
OTIS DAVIS,) HONORABLE THOMAS P. CAWLEY,
) Presiding.
Defendant-Appellant.)

MR. JUSTICE STAMOS delivered the opinion of the court.

After a bench trial, defendant Otis Davis was found guilty of battery in violation of Section 12-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-3) and sentenced to 30 days in the House of Correction. He appeals, his sole contention being that he did not knowingly and understandingly waive his right to a jury trial.

The record shows the following:

THE CLERK: Otis Davis, sheet 10, line 1.

THE COURT: This man is locked up. When were you arrested?

DEFENDANT DAVIS: Yesterday morning.

THE COURT: I will give you more time, that's all I can do.

MR. SMIERCIAK: Who ---
(Assistant State's Attorney)

THE COURT: He was arrested yesterday. We have been trying to accommodate both sides to go to trial but we can't get to it. Why don't you talk to your man? I will try to set some date. He was just arrested.

MR. SMIERCIAK: We are ready for trial.

THE COURT: Are you ready?

MR. PTACEK: No.
(Assistant Public Defender)

MR. SMIERCIAK: The State's ready for trial.

THE COURT: Okay, have you talked to this man?

MR. PTACEK: No, I haven't, your Honor.

(Whereupon a conference was had, off the record,
between the Public Defender and the Defendant.)

The Public Defender is ready, your Honor. Plea of not guilty,
waive trial by jury.

THE COURT: Swear the witnesses.

The right to a jury trial may be waived by defense counsel where
the waiver takes place in open court in the presence of defendant;
an accused who stands mute while his counsel waives the right to a
jury trial is deemed to have acquiesced in that waiver. People v.
Sailor, 43 Ill.2d 256, 253 N.E.2d 397. No distinction has been made
between jury waivers by retained counsel and by court-appointed counsel
where, prior to the waiver, defendant was afforded an opportunity to
confer with his court-appointed counsel. People v. McClinton, 4 Ill.
App.3d 253, 280 N.E.2d 795; People v. Taylor, 13 Ill.App.3d 253, 300
N.E.2d 862.

In the case at bar, the record reflects that, when the court
learned that the newly-appointed Assistant Public Defender had not
yet talked to defendant, defendant was then afforded the opportunity
to, and did, confer with his counsel. The record is clear that the
defendant was in open court when his attorney waived trial by jury.
The jury was properly waived under these circumstances. People v.
Morgan, ___ Ill.App.3d ___, ___ N.E.2d ___ (First District, No. 59030,
filed February 25, 1974); People v. Nogas, ___ Ill.App.3d ___,
___ N.E.2d ___ (First District, No. 59013, filed March 7, 1974).

The judgment of the Circuit Court is affirmed.

A F F I R M E D.

DOWNING, J., concurs.
HAYES, P.J., specially concurring.

PUBLISH ABSTRACT ONLY.

HAYES, P.J., specially concurring:

I concur fully with all that is said in the opinion of the court, but I wish to add a word dealing with the cases relied upon by defendant in his brief.

In People v. Boyd (1972), 5 Ill. App. 3d 980, 284 N.E. 2d 699, the record appears to have disclosed that there had been no opportunity whatever for a conference between defendant and his appointed counsel. Hence, Boyd is easily distinguishable from the instant case, and the decision in Boyd is not at odds with our opinion herein.

In People v. Rambo (1970), 123 Ill. App. 2d 299, 260 N.E. 2d 119, it appears to have been not so much the age and inexperience of the defendant which created the duty of extra care as it was the serious nature of the offense for which the defendant was about to be tried.

People v. Bell (1968), 104 Ill. App. 2d 479, 244 N.E. 2d 321, is one of a few decisions of this court (all preceding the decision in People v. Sailor) in which this court required the jury waiver to be elicited by the trial court directly from the defendant himself; in People v. Sailor, no such requirement was adopted, perhaps because direct questioning of a defendant by the trial court in matters preceding the beginning of the presentation of the State's case-in-chief often proved not to be an unmixed blessing for the defendant.

The only post-Sailor decision which supports defendant's contention is the supplemental opinion on rehearing in People v. Baker (1970), 126 Ill. App. 2d 1, 262 N.E. 2d 7, in which the court adhered to its pre-Sailor decision and concluded that the Sailor rule did not apply. The several other post-Sailor decisions cited in our opinion held that it did, a conclusion with which we hereby agree.



59130

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,)

vs.

KENNETH F. CARTER,

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.HONORABLE FRED G. SURIA,
Presiding.

PER CURIAM* (Second Division, First District):

Kenneth F. Carter, defendant, was charged by indictment with two counts of armed robbery and one count each of attempt murder, aggravated battery, and burglary (Ill. Rev. Stat. 1971, ch. 38, pars. 8-4, 12-4, 18-2 and 19-1). On April 19, 1973, defendant entered a negotiated plea of guilty to the indictment and was sentenced to a term of five to ten years on each count, the sentences to run concurrently. Defendant appeals, arguing that the trial court failed to determine that there was an adequate basis for his pleas of guilty to aggravated battery and attempt murder of Allen Brown, that he was improperly convicted of attempt murder and aggravated battery of Allen Brown since both crimes arose out of the same course of conduct, and that his sentence for aggravated battery (should the conviction be affirmed) and for burglary must be reduced under the Unified Code of Corrections.

On April 19, 1973, when defendant's case was called, defense counsel, in defendant's presence, asked that a pretrial conference, which had previously been held, be continued. Defendant was informed as to what a pretrial conference was and gave his consent. The conference was then held. When the case was recalled, defense counsel, in defendant's presence, stated that he had informed defendant of the results of the pretrial conference and that defendant wished to enter a plea of guilty in return for a sentence of five to ten years. Defendant was informed that by entering a plea of guilty,

* HAYES, P.J., STAMOS AND DOWNING, JJ., participating.

he was waiving his right to remain silent, his right to a jury trial, and his right to a trial of any type. Defendant stated that he understood. The trial judge carefully advised defendant in detail as to the basis of each of the five counts of the indictment. Defendant stated that he understood the nature of the charges against him. Defendant was advised as to the possible penalties on each of the five counts of the indictment and as to the fact that the sentences could be made consecutive or concurrent. Defendant stated that he understood there had been a pretrial conference and knew the sentence he would receive. Defendant said that he was freely and voluntarily entering the plea of guilty.

It was stipulated that the State's witnesses would testify that on April 8, 1972, defendant and Michael Boney entered the apartment of Carol Brown through a back window. Defendant was armed with a .38 caliber revolver and Boney was armed with a .22 caliber sawed-off rifle. The two men tied up David and Allen Brown, who were in the apartment. During the burglary, Boney shot Allen Brown. Defendant and Boney then gathered certain items from the apartment and fled in a taxicab driven by John Neeley. While in the cab, defendant and Boney robbed Neeley. During the robbery, Boney shot Neeley.

Defendant's written statement given to the police was also introduced into evidence. In that statement defendant admitted that , on April 8, 1972, he and Boney agreed to go out and commit a robbery. He carried a revolver, while Boney carried a rifle. When they could not find anyone to rob on the street, they decided to break into an apartment. They entered the Brown apartment through a back window. Defendant stated that he was at the front of the apartment when he heard a sound like a slap or a clap in another part of the apartment. After gathering certain items from the apartment, they called a cab to transport the stolen property. Defendant stated that while in the cab he handed Boney a gun and

told him to stay in the cab while he took the stolen property out. While defendant was unloading the stolen property from the cab, he saw Boney struggling with the cab driver and heard a shot. Defendant stated that he then ran down an alley and hid on a roof.

First we consider defendant's argument that the trial court failed to determine that there was an adequate factual basis for his plea of guilty to attempt murder. Under Supreme Court Rule 402(c) (Ill. Rev. Stat. 1971, ch. 110A, par. 402(c)) the trial judge is required to determine whether there is a factual basis for the plea of guilty before entering final judgment. However, the quantum of proof necessary to determine that there is a factual basis for the plea of guilty is less than that necessary to sustain a conviction after a full trial. The rule does not require that the trial judge be convinced beyond a reasonable doubt that there is a factual basis for each element of the crime charged. People v. Arnold, 18 Ill.App.3d 95, 309 N.E.2d 406; People v. Reddick, 11 Ill.App.3d 492, 297 N.E.2d 360; People v. Love, 6 Ill.App.3d 577, 286 N.E.2d 355.

In the case at bar, there had been a pretrial conference at which the trial judge was informed of the facts of the case. At the plea of guilty, each count of the indictment was explained in detail to defendant, who stated that he understood them. Prior to entering his plea of guilty, defendant knew the exact sentence he would receive. After all of the proper admonishments, there was a stipulation as to the facts of the case. Defendant urges that there was insufficient evidence to demonstrate a specific intent on the part of Boney to commit murder. Intent is a state of mind and can be shown by surrounding circumstances. Intent to take a life may be inferred from the character of the assault, the use of a deadly weapon and other circumstances. (People v. Koshiol, 45 Ill.2d 573, 262 N.E.2d 446; People v. Dennis, 5 Ill.App.3d 708, 284 N.E.2d 67.) Here, defendant and Boney, both armed with guns, broke into an apartment and tied up the two occupants. Their admitted purpose was to burglarize the premises.

During that burglary, Boney shot Allen Brown. Considering the fact that the shooting took place during the commission of a forcible felony, the use of a deadly weapon and the other circumstances of this case, we believe that the requisite intent was sufficiently established to provide a factual basis for defendant's plea of guilty.

Defendant also urges that the facts failed to demonstrate that he committed the acts personally or was accountable for the commission of those acts. A person is accountable for the criminal activities of another when "either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense" (Ill. Rev. Stat. 1971, ch. 38, par. 5-2(c)). The legal responsibility extends to an act committed by any of the parties done in furtherance of the common design. (People v. Moore, 14 Ill.App.3d 361, 302 N.E.2d 425.) Here, the stipulated facts demonstrate that defendant voluntarily went out with Michael Boney, armed with a pistol and a rifle, with the admitted purpose of committing a crime. They broke into the apartment of Carol Brown, where they tied up the two occupants. During the burglary, Boney shot Allen Brown, one of the occupants of that apartment. Under these circumstances, defendant was responsible for the acts of Boney done in furtherance of the burglary. The trial judge had sufficient evidence to determine that there was a factual basis for the plea of guilty to attempt murder which was voluntarily entered by defendant.

We next consider defendant's argument that he was improperly convicted of both aggravated battery and attempt murder of Allen Brown, since both crimes arose out of the same course of conduct. The State in its brief concedes that both crimes arose out of the same course of conduct, but urges this court to vacate merely the sentence on the aggravated battery charge. The Illinois Supreme Court, in the recent case of People v. Lilly, 56 Ill.2d 493, 309 N.E.2d 1, ruled that where two crimes arise out of the same course of conduct, a

defendant cannot be convicted of both, even where only one sentence is imposed. Therefore, defendant was improperly convicted of both charges, and his conviction for aggravated battery cannot stand.

Since we have determined that defendant's conviction for aggravated battery must be reversed, it is unnecessary for us to consider his argument that the trial judge failed to determine that there was an adequate factual basis for his plea of guilty to aggravated battery or his argument that his sentence for aggravated battery must be reduced under the Unified Code of Corrections.

Defendant's final argument is that his sentence of five to ten years for burglary must be reduced under the Unified Code of Corrections. Under the Unified Code of Corrections burglary is a Class 2 felony (Ill. Rev. Stat. 1973, ch. 38, par. 19-1). The Code provides that for a Class 2 felony the maximum penalty shall be any term in excess of one year and not exceeding twenty years (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(3)) and that the minimum term shall be one year, unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term which shall not be greater than one-third of the maximum term (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(3)). Here, defendant's minimum sentence of five years is in excess of one-third of the maximum and must, therefore, be reduced to three years and four months.

Accordingly, defendant's conviction and sentence thereunder for aggravated battery are reversed, defendant's minimum sentence on the conviction of burglary is reduced to three years and four months, and, as modified, the judgments of the Circuit Court of Cook County as to attempt murder and burglary are affirmed.

REVERSED IN PART;
AFFIRMED AS MODIFIED IN PART.

PUBLISH ABSTRACT ONLY.





NO. 59367

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
CARL GIBBS, a/k/a CARL MENEFEE,	)	HONORABLE
	)	DANIEL J. WHITE,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Carl Gibbs, a/k/a Carl Menefee, defendant, was found guilty after a bench trial of two separate charges of battery in violation of section 12-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-3). He was sentenced to 30 days in the House of Correction on each charge, the sentences to run consecutively.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender of Cook County has filed a motion in this court for leave to withdraw. The motion is supported by a brief pursuant to Anders v. California, 386 U.S. 738. The motion and brief conclude that an appeal would be wholly frivolous and without merit. On September 5, 1973, defendant was mailed copies of the motion and brief. He was informed that he had until November 26, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

The motion and brief of the public defender of Cook County allege that the only possible argument which could be made on appeal is whether the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. The rule is well established that in a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight

to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to the defendant's guilt will the finding of the trial court be disturbed. People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385. The testimony of a single witness is sufficient to convict if the testimony is positive and the witness credible, even though it is contradicted by the defendant. People v. Stringer, 52 Ill. 2d 564, 289 N.E. 2d 631.

At trial, Chicago Police Officer James Eldridge and Roosevelt Ely testified that on May 15, 1973, at approximately 8:30 P.M., they placed the defendant under arrest at 6520 South Stuart, Chicago, Illinois. Defendant was suffering from injuries he had received in a fight and was transported to St. Bernard Hospital for medical treatment. In the emergency room of the hospital, defendant refused medical treatment and attempted to escape. As the officers attempted to restrain defendant, he kicked Officer Eldridge in the left thigh and kicked Officer Ely in the crotch. The officers took defendant outside and while putting him into the squad car, the defendant spat at them. Inside the squad car, the defendant kicked Officer Ely in the head behind his right ear. This testimony was sufficient for the trial court to find that defendant's guilt had been established beyond a reasonable doubt, even though the defendant presented testimony to the contrary.

We have examined the record and concur in the opinion of the public defender that the argument thus raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are not also frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on

appeal and the judgment of the circuit court of Cook County
is affirmed.

Motion allowed.
Judgment affirmed.

Second Division.

Judge Downing did not participate.

Publish abstract only.



58358

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County,
vs.)	
	)	Honorable
WILBUR WRIGHT,	)	Joseph A. Power,
Contemnor-Appellant.	)	Presiding.

PER CURIAM:

The contemnor, Wilbur Wright, executed an affidavit subsequently filed in support of the post-conviction petition of Larry C. Hayes. When Wright appeared as a witness at the hearing on Hayes' petition on November 2, 1972, the court cited him for direct criminal contempt of the court, adjudged him guilty of direct criminal contempt after summary proceedings and immediately sentenced him to serve six months in the Cook County Jail. The contemnor has brought this appeal, contending that his conduct, if contemptuous, did not constitute a direct criminal contempt of court and that he was denied due process of law in violation of the United States Constitution when the court failed to appoint counsel for him.

An understanding of the charges requires a brief summary of the proceedings below that led up to the court's finding that Wright was in direct contempt when he testified on November 2, 1972. Larry Hayes filed an amended post-conviction petition on August 7, 1972, attaching thereto an affidavit by Wilbur Wright. The petition alleged that Larry Hayes, Wilbur Wright and Lawrence Goodwin were indicted in Indictment #67-3235 for the robbery of Thomas Stevens,

and were tried before Judge Francis T. Delaney on September 16, 1969; that Hayes was found guilty by a jury on that date and sentenced to not less than 20 nor more than 30 years and that his conviction was subsequently affirmed by the Illinois Supreme Court; prior to September 16, 1969, Wright and his attorney, Raymond Ewell, and the assistant State's attorney, Richard Neville, had a conference in which it was agreed that Wright would plead guilty and Neville would seek the concurrence of the court in securing a four to six year sentence for Wright; during one of several meetings, Wright expressed personally and through his attorney that he would not testify for the prosecution against the co-defendants "as a condition of the presentence agreement"; Neville imposed as a condition that Wright not testify on behalf of either the defense or the prosecution during the trial of Goodwin and Hayes and that Wright's adherence to the agreement would be insured by delaying imposition of his sentence until "subsequent to" the trial of Goodwin and Hayes; Judge Delaney agreed to this and to the conditions attached thereto; on September 16, 1969, Wright entered a plea of guilty at which the court admonished him after a reference by the State's attorney that "you will not any further take part in any proceeding having to do with this case either as a witness for the State or as a witness for the other two defendants", and the State's attorney indicated it was his understanding that a recommendation was to be withheld at that time; on October 2, 1969, Wright was sentenced to four to six years, concurrent with a sentence previously imposed on an unrelated charge, at which time assistant State's attorney Neville

stated the reason for the court delaying sentence was for the trial on the other co-defendants to be completed.

Wright's affidavit stated that Ewell informed Neville that Wright was "not a willing witness for the prosecution", and that if he were to testify, his testimony would "tend to exculpate" the remaining co-defendants, that it was agreed as a condition of the plea that Wright would not testify and that, "to insure compliance", sentencing of Wright was delayed until after trial of Hayes and Goodwin; that a conference occurred about September 16, 1969, at which Judge Delaney agreed to these conditions by including the condition that Wright not testify for either side. Wright's affidavit said that Hayes was not present at any time during the course of the robbery nor did Hayes participate in any way in the preparation or execution of the robbery and that neither Hayes nor his attorney had any knowledge prior to or during Hayes' trial of the conditions attached to Wright's plea or that Wright had any information exculpating Hayes.

On October 19, 1972, a hearing was held on the Hayes petition at which Hayes, along with the trial judge, Francis T. Delaney, and the assistant State's attorney, Richard Neville, testified. The case was then continued until November 2, 1972, at which time Raymond Ewell and then Wright testified. There were conflicts in the testimony. For example, Wright testified his attorney first brought it to his attention not to testify, but his attorney testified it was Wright's own idea. Wright testified he was present in the judge's chambers on the day the guilty plea arrangements were made, but Judge Delaney testified that although he had no indepen-

dent recollection of the conference, he never saw Wright until he pleaded guilty. Wright testified that the judge and the State's attorney gave him "the impression" that he would get a greater sentence if he testified for his co-defendants, whereas the assistant State's attorney and the trial judge testified it was Wright who was unwilling to testify and that no conditions were attached to the guilty plea agreement.

The order of contempt contains five separate specifications. Four of these specifications essentially charge that Wright testified falsely, first that his affidavit exculpating Hayes was false and, secondly, that he testified falsely at the hearing in these three particulars: (1) that it was his lawyer who first "brought it to his attention not to testify"; (2) that he was present in the judge's chambers when the agreement was made between himself, his attorney, the assistant State's attorney and the judge; and (3) that the judge and the assistant State's attorney gave him the "impression that if he testified for the defendant, he would get a greater sentence". The order also found that Wright "gave evasive answers and wouldn't identify who else was involved in the crime", a finding based on Wright's initial refusal to answer whether Goodwin, the other original co-defendant, was implicated in the original crime.

It is evident from the foregoing that four of the five specifications involved the charge that Wright testified falsely, first when he executed a false affidavit and, secondly, that his testimony at the post-conviction hearing was false in three respects discussed above.

The question presented is whether Wright's conduct as set forth in the court's order constituted a direct criminal contempt, thus authorizing the court's use of the summary contempt power. Recently in People v. Toomin (1st Dist., 3rd Div: March 21, 1974), ___ Ill.App.3d ___, ___ N.E.2d ___, General No. 57172, slip opinion, pages 3-4, we set forth the general principles applicable on review of a court's exercise of the summary contempt power in the following language:

"To sustain on appeal a finding of direct contempt of court, it must be shown that the particular conduct was calculated to embarrass, hinder, or obstruct the court in the administration of justice, or to lessen its authority or dignity, or to bring the administration of law into disrepute. (People v. Miller (1972), 51 Ill.2d 76, 281 N.E.2d 292.) The party seeking to uphold the contempt order bears the burden of showing that the court was warranted in exercising its power. (People v. Tavernier (1943), 384 Ill. 388, 51 N.E.2d 528.) It should also be borne in mind that a court must exercise its power in direct contempt proceedings prudently and judiciously because normal constitutional safeguards are not applicable. People v. Loughran (1954), 2 Ill.2d 258, 118 N.E.2d 310."

In Bloom v. Illinois, 391 U.S. 194, 201, the court stated: "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both". The Supreme Court of the United States and the Illinois Supreme Court have been careful to limit strictly the exercise of the summary contempt power to cases in which it is clear that all of the elements of misconduct were personally observed by the court. Typically, these are cases involving physical acts disturbing the actual conduct of the proceedings, such as striking an assistant State's attorney in the nose in open court.

People v. Carr (1971), 3 Ill.App.3d 227, 278 N.E.2d 839. But the court has disapproved of the use of the summary contempt power to punish a husband who allegedly struck his wife's lawyer, even though the conduct occurred outside the courtroom on the same floor of the Chicago Civic Center, the court stating (People v. Javaras (1972), 51 Ill.2d 296, 299, 281 N.E.2d 670):

"The procedural requirements for judicial punishment for criminal contempt of court depend upon whether the contempt is 'direct' or 'indirect' ... As a general rule, a direct criminal contempt (involving punishment of less than six months imprisonment) which is personally seen by the judge may be summarily punished without the necessity of a hearing or other procedural formalities. A direct criminal contempt which occurs in the constructive 'presence of the court' may call for the hearing of extrinsic evidence (citations omitted), although, again, the proceeding may be essentially summary in nature. If, however, such evidence is necessary to establish the contempt, notice and hearing are required (citations omitted)."

Filing a false affidavit and testifying falsely may be punished as contempt of court since such conduct quite clearly is calculated to embarrass, hinder and obstruct the court in the administration of justice, lessens its authority and dignity and brings the administration of justice into disrepute. See Forest v. Forest (1973), 9 Ill.App.3d 111, 291 N.E.2d 880, and People v. Bennett (1972), 51 Ill.2d 282, 281 N.E.2d 664. However, false testimony or perjury is not generally punishable summarily as a direct criminal contempt of court since a direct contempt consists of "contumacious acts committed in the court in the presence of the judge, of which he has personal knowledge". People v. Koniecki (1961), 28 Ill.App.2d 483, 487, 171 N.E.2d 666. Thus, falsely

swearing, while it may be contemptuous, is not usually subject to summary contempt power because, first, the trial judge will not usually have personal knowledge of the truth or falsity of the matters being controverted and because false testimony usually lacks the element of immediately disrupting and disturbing the court's business. In Koniecki, for example, an unwilling witness for the prosecution testified inconsistently and initially refused to answer a question that called for an answer inconsistent with his pretrial statements. The trial was postponed so he could confer with counsel and Koniecki then took the stand and testified. The reviewing court concluded in reversing his conviction and sentence for direct criminal contempt (28 Ill.App.2d 483, 487-488):

"An obstruction to the performance of judicial duty, resulting from an act done in the presence of the court, is the characteristic upon which the power to punish for direct contempt must rest. In order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury, under the general law, the further element of obstruction to the court in the performance of its duty. If the element of obstruction to the court was not essential, it would follow that when a court believed that a witness was testifying untruthfully, it would have the power to impose punishment for contempt with the object or purpose of extracting from the witness a character of testimony which the court would deem to be truthful, and the freedom of the citizen, when called as a witness in court would be gravely imperiled. (Ex parte Hudgings, 249 U.S. 378 (1919).)"

In In Re Oliver (1948), 333 U.S. 257, 275-276, the court characterized direct contempts as a "narrow exception" to the usual due process requirement which:

"includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and

where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out."

Such a case, the court said, was Ex parte Terry (1888), 128 U.S. 289, where Terry assaulted a marshall who was removing a heckler from the courtroom.

Usually, a court cannot determine with certainty the question of perjury without considering extrinsic evidence. An exception is the case of People v. Bennett (1972), 51 Ill.2d 282, 281 N.E.2d 664, in which the contemnor admitted that an allegation in his own post-conviction petition concerning the length of the sentence his attorney told him he would receive was "mistaken," since the conduct constituting the contempt had been admitted. Extrinsic evidence was unnecessary and summary proceedings were appropriate. In the case at bar, however, Wright did not admit the falsity of his affidavit or his testimony. It is clear that the court concluded that Wright testified falsely based not on his personal knowledge that Wright's testimony was false, but upon extrinsic evidence. The order, itself, recites the extrinsic evidence on which the court relied: the Supreme Court opinion, the papers filed in the case, the testimony of Wright's attorney, Judge Delaney and the assistant State's attorney, Mr. Neville. We conclude, in regard to the four charges that Wright testified falsely, that the court's exercise of the summary contempt power

was not appropriate, first, because the acts were not actually obstructive to the court's proceedings and, secondly, because the trial judge did not have personal knowledge of their truth or falsity.

As to the remaining charge, the State contends that Wright was properly punished summarily for failing to answer the court's question whether Goodwin (the third original co-defendant, along with Wright and Hayes) was involved in the 1967 armed robbery. But the record shows Wright eventually answered the question, stating Goodwin was not present and naming the other two persons as "Blood" and "Big John", rather than Hayes and Goodwin. A complete refusal to testify, not based on Fifth Amendment privilege, may subject a witness to punishment for contempt. People v. Carradine (1972), 52 Ill.2d 231, 234, 287 N.E.2d 670. However, where, as here, the witness answered the question, albeit reluctantly, the conduct of the witness did not "so directly obstruct" the "court in the performance of its duty as to justify punishment for direct contempt". People v. Koniecki, supra, 28 Ill.App.2d 483, 486-487.

Since we have concluded that the facts shown by this record "put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel" (In Re Oliver, 333 U.S. 257, 276), it follows that the crime of contempt with which Wright stood charged could "not be tried without a lawyer". Argersinger v. Hamlin 407 U.S. 25, 26.

The judgment of the circuit court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THIRD DIVISION: Justice Mejda did not participate.

73-317

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
July 26, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

FILED

LOCAL 1. STATE COURT
Abstract

No. 73 317

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Cir-
	)	cuit Court for the
JACK LEON COMPTON,	)	16th Judicial Circuit,
	)	Kane County, Illinois.
Defendant-Appellant.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court;

Defendant was indicted for murder. On March 3, 1970 he moved to withdraw his plea of not guilty and his plea of guilty was tendered and accepted; defendant was sentenced to fourteen to twenty years in prison. He then took a direct appeal to this court. We affirmed the conviction holding that the record affirmatively disclosed that the trial court properly determined that his guilty plea was voluntarily and knowingly entered. People v. Compton (1973), 16 Ill. App. 3d 196 (Abs.).

The instant appeal is taken from the order of the Circuit Court of Kane County denying post conviction relief after an evidentiary hearing. On this appeal the trial court appointed the Illinois Defender Project as defendant's counsel. The Deputy Appellate Defender has filed a motion for leave to withdraw for the reason that the appeal is without merit, together with his brief, a copy of which has

been furnished to the defendant. Defendant was properly notified and time was allowed to him to raise any objections. He has presented no objections or comments with respect thereto.

We have made a full examination of all of the proceedings. At the evidentiary hearing on the allegations of his petition for post conviction relief, the court heard extensive testimony of Messrs. Cecil Partee and Samuel R. Patterson, who represented the defendant prior to and at the time the defendant's guilty plea was tendered and accepted. The defendant himself also testified and the court received by stipulation the evidentiary deposition of Mr. William R. Ketcham, then State's Attorney of Kane County, relating to the conduct of defendant's counsel and of defendant's conferences with them prior to and on the date of his guilty plea. While his trial counsel recommended a plea of guilty based on the evidence against the defendant, his prior record and the State's Attorney's unwillingness to reduce the charge of murder, no threats or promises were made to the defendant. The testimony shows that defendant himself made the choice to plead guilty. There is no evidence that defendant ever told his retained counsel that he did not want them as his attorneys and defendant twice stated at the time of his plea of guilty that he was satisfied with their representation. The defendant did not meet the burden of showing by a preponderance of the evidence a denial of any constitutional right. (People v. Stovall (1970), 47 Ill. 2d 42, 47.) A post conviction petition is properly denied where the evidence at the hearing thereon fails to show affirmatively that his guilty plea was coerced as a result of defendant's counsel's action. People v. Phelps (1972), 51 Ill. 2d 35, 38.



In his post conviction petition defendant alleged that his arrest was illegal and that his statement while in custody at the Aurora Police Department was coerced through promises and misrepresentations that there would be a finding of self-defense if defendant made the statement. These matters are not cognizable in post conviction proceedings since a voluntary plea of guilty waives all non-jurisdictional errors. People v. Phelps, supra.

Post conviction matters should ordinarily be presented to the same judge who rendered the original judgment. In the absence of special circumstances not present here the trial judge properly denied the defendant's motion for substitution of judge. People v. Hannon (1971), 48 Ill. 2d 462, 465.

Finally, we hold that the record shows that the post conviction trial counsel complied with the procedural requirements of Supreme Court Rule 651 (c) (Ill. Rev. Stat. 1971, ch. 110A, par. 651 (c)). While counsel did not file a written certificate showing that he examined the report of proceedings from the original trial such certificate is not required where the record itself, as it does here, contains a showing that counsel consulted with the defendant and reviewed the report of proceedings. People v. Enyart (1974), 18 Ill. App. 3d 504, 505.

We conclude from our examination of the entire record that defendant's appeal is without merit. The office of the State Appellate Defender is therefore given leave to withdraw and the decision of the trial court is affirmed.

Motion to withdraw granted and judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.

No. 73-266

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED

JUL 23 1974

FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	:
	: Appeal from the Circuit Court of
Plaintiff-Appellee,	: Jackson County.
	:
v.	:
TOMMIE L. CALVIN,	:
	: _____
Defendant-Appellant.	:
	: Honorable Everett Prosser,
	: Judge Presiding.
	:

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

This is an appeal from an order of the circuit court of Jackson County denying the defendant's motion for an evidentiary hearing and dismissing his petition for rehearing under the Post-Conviction Hearing Act. The defendant, Tommie L. Calvin, was charged with armed robbery and aggravated battery. After plea negotiations the defendant, on April 21, 1972, pleaded guilty to the offense of robbery. On May 22, 1972, after a hearing on aggravation and mitigation was held, the trial court sentenced the defendant to three to five years in the penitentiary.

The defendant filed an amended petition for post-conviction relief.

In this petition the defendant alleged due process violations in the acceptance of the guilty plea because of: (1) failure to comply with Rule 402(c), determination of a factual basis; (2) coercion and ill treatment while incarcerated prior to the plea; (3) the trial court's failure to hold a competency hearing prior to acceptance of the plea; and (4) the trial court's consideration of arrests not reduced to conviction in determining sentence. The State filed a motion to dismiss asserting that no issue of constitutional dimension was raised. A hearing was held on the motion to dismiss, after which the motion to dismiss was granted. This appeal followed. The sole issue

raised on appeal is whether the trial court erred in dismissing the defendant's petition without an evidentiary hearing on the basis of coercion of his plea of guilty by mistreatment during incarceration.

Section 1 of the Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch. 38, par. 122-1) provides that:

"Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing * * * a petition * * * verified by affidavit."

Section 2 provides that:

"The petition shall have attached thereto affidavit, records, or other evidence supporting its allegations or shall state why the same are not attached."

In the instant case, no supporting affidavit or other material was attached to defendant's amended petition, for post-conviction relief with respect to the claim raised herein. Therefore the sufficiency of the petition must be judged on the basis of its contents alone. Said petition alleges in part that:

"1. On April 21, 1972, Petitioner entered a plea of guilty to the offense of robbery in Amended Information No. 72-CF-20 and was sentenced by the Honorable Everett Prosser to a term in the Illinois State Penitentiary of not less than three nor more than five years.

2. * * *

3. Petitioner's plea of guilty was involuntary and was secured in violation of his right to Due Process under Amendment XIV of the United States Constitution, and the Illinois Constitution of 1970, Article I, Section 2, in that Petitioner was coerced to enter said plea by the treatment he received while a prisoner in the Jackson County, Illinois jail subsequent to his arrest and prior to the date said plea was accepted, May 22, 1972. While in the Jackson County, Illinois jail, petitioner was maced three times, was stripped of his outer clothing, and was forced to sleep on a concrete floor because the steel bed in his jail cell was in such a state of disrepair that he could not lie on it. At Page 8 of the record of the sentencing proceedings which occurred May 22, 1972, Petitioner advised the Court, 'I was wanting to get away from there because of what they were doing to me.' The Court responded, 'Mr. Calvin, I don't quite understand what you are saying * * *.' (Emphasis added.)

It should be noted that the acts complained of are alleged to have occurred

prior to May 22, 1972. However, defendant concedes in the first paragraph of the above petition, and at the hearing on the State's motion to dismiss the amended post-conviction petition the trial court held, that the guilty plea was accepted on April 21, 1972. Thus defendant has failed to allege that said acts occurred prior to the trial court's acceptance of his plea of guilty. In other words, the defendant failed to allege that the acceptance of his guilty plea was caused by any substantial denial of his constitutional rights. Furthermore, the record before us is barren of any indication of coercion prior to the acceptance of the defendant's plea of guilty. Under such circumstances the trial court was correct in dismissing the petition without an evidentiary hearing.

Accordingly, the order of the circuit court of Jackson County is affirmed.

Order Affirmed.

CREBS and CARTER, J.J. concur.

PUBLISH ABSTRACT ONLY

UNITED STATES OF AMERICA

State of Illinois)
 Appellate Court) ss.
 Second District)

At a session of the Appellate Court, begun and held
 at Elgin, on the 3rd day of December, in the year of our
 Lord one thousand nine hundred and seventy-three, within and
 for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L. L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

AUG 1 1974 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
 following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court for the 17th Judicial
LEE ARTHUR FRICKS,	)	Circuit, Winnebago County,
	)	Illinois.
Defendant-Appellant.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was indicted for attempted escape, aggravated battery and robbery. He pleaded guilty to attempted escape and aggravated battery, and pursuant to a negotiated plea the State dismissed the robbery charge and agreed not to prosecute a separate, unrelated burglary charge. The trial court imposed sentence of 1-3 years for aggravated battery; no sentence was imposed for the offense of attempted escape.

On appeal defendant contends that (1) the count charging attempted escape cannot support conviction for failure to "charge an offense", (2) the convictions for aggravated battery and attempted escape are improper since both offenses arose out of the same course of conduct, (3) the trial court failed to inquire into the voluntariness of defendant's plea, and (4) the State inadequately identified the burglary charge which it agreed not to prosecute.

We will discuss defendant's second contention first. Defendant argues that the convictions for both attempted escape and aggravated battery are improper because both offenses arose out of the same course of conduct. Defendant cites People v. Lerch (1972), 52 Ill. 2d 78, and People v. Russo (1972), 52 Ill. 2d 425. In each of these cases the defendant was convicted of both aggravated battery and attempted escape. In each case both crimes involved the same conduct and in each case the Illinois Supreme Court reversed the conviction for attempted escape but not for aggravated battery. In the instant case, the defendant and two other prisoners rushed Officer Frederichs, forced him into a cell, tied him up, blindfolded him, threw him to the floor and kicked and beat him, and then attempted to escape. Also, in the instant case defendant was sentenced for aggravated battery although he was found guilty but was not sentenced for the attempted escape. Inasmuch as the conviction for aggravated battery is properly before the court on appeal, the incomplete conviction entered on the attempted escape charge (because defendant was not sentenced) may be vacated under Supreme Court Rule 366 (Ill. Rev. Stat. 1971, ch. 110A, par. 366.) We therefore vacate the conviction for attempted escape which is the less serious offense because it arises out of and is a part of the same conduct which comprises the aggravated battery. People v. Lerch, supra, and People v. Lilly (1974), 56 Ill. 2d 493, 496.

Since we have determined that the conviction for attempted escape must be vacated, leaving only a conviction for aggravated battery,

the indictment for which offense the defendant does not challenge, we need make no decision on defendant's first contention which involved the sufficiency of the indictment for attempted escape.

Defendant next contends that the trial court did not inquire into the voluntariness of his guilty plea, as required by Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402), nor determine whether defendant understood the admonitions. The record discloses that defendant's counsel made a complete statement in announcing defendant's guilty plea to Counts I and II, reciting the agreement whereby the State was to dismiss Count III charging robbery and not prosecute defendant on a separate unrelated burglary charge for which he had been arrested and was in jail at the time of this indictment". Defendant was then advised of his rights to trial by jury, to confront and cross-examine witnesses against him; that his waiver of jury trial would result in a trial by the court, and of the possible minimum and maximum sentences. It is not required that the determination of voluntariness may only be made by asking defendant whether any promises or threats have been made or by using any particular words or phrases. Here there was a plea agreement and the totality of the admonishment as to the rights defendant was waiving by his plea and the discussion of the terms of the plea bargain provides adequate information to assure that the plea was freely and voluntarily made. Thus, the trial court substantially complied with Supreme Court Rule 402. (People v.

Mendoza (1971), 48 Ill. 2d 371, 373; People v. Williams (1973), 16 Ill. App. 3d 199, 202; People v. Reeves (1971), 50 Ill. 2d 28, 29; People v. Fricks (1974), 17 Ill. App. 3d 933 (Abst.) It should be noted that defendant does not make any claim that he was coerced to plead guilty or that he was in any way prejudiced by the court's admonition.

Finally, defendant contends that there was insufficient identification of the "separate, unrelated burglary charge" which the State agreed not to prosecute and in support of this contention defendant cites Santobello v. New York (1971), 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495. We find that case to be not in point. In Santobello the State did not abide by its plea bargain and the Supreme Court reversed for that reason. The question here is identification of the burglary charge. At the hearing on the guilty plea the Public Defender informed the court relative to this charge, saying, " . . . and Mr. Fricks also will not be further prosecuted on a separate unrelated burglary for which he had been arrested and was in jail at the time of this indictment", to which the Assistant State's Attorney replied, "That is correct, your honor." The "separate unrelated burglary" was further mentioned during the probation hearing, as follows:

"Mr. Peterson:	(Assistant State's Attorney)
Q	Tell the Court why you went back to jail on May 27th.
A	(by defendant) My cousins, James Hamiltons (sic) told Detective Brand that I did some burglary with him.
Q	You were arrested then on that burglary, and in jail on that burglary at the time of the attempted escape?
A	Yes."

It appears from the above that the burglary in question, if the occasion were to arise, could be identified. Secondly, this contention is based on supposition. We need not in this case speculate on some

possible future proceeding. If the State in the case at bar were to initiate prosecution for the separate, unrelated burglary for which he was being held in jail, then the defendant will have adequate opportunity to invoke Santobello as a bar to such prosecution. People v. Ellis (1974), 16 Ill. App. 3d 282, 284; People v. Fickes (1967), 89 Ill. App. 2d 300; People v. Schleyhahn (1972), 4 Ill. App. 3d 591, 594-595.

For the reasons given, the judgment of the Circuit Court of the 17th Judicial Circuit entered upon the defendant's plea of guilty to aggravated battery is affirmed; the conviction for attempted escape is reversed and the cause is remanded with directions to vacate that conviction.

Affirmed in part and reversed and vacated in part.

THOMAS J. MORAN, P.J. and GUILD, J., concur.

No. 74-12

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED
JUL 23 1974
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

} Appeal from the Circuit Court of
Jackson County

WILLIAM RODELY,

Defendant-Appellant.

} Honorable Richard Richman,
Judge Presiding.

r. JUSTICE CARTER delivered the opinion of the court:

On May 31, 1973, William Rodely was indicted by the Grand Jury of Jackson County for the offense of unlawful delivery of a controlled substance. At a hearing before the Circuit Court on October 11, 1973, defendant pled guilty to the charged offense and was sentenced to a term of one to three years in accordance with a plea bargain agreement. Defendant appeals on the grounds of alleged violation of Illinois Supreme Court Rule 402(a)(2), Ill. Rev. Stat., ch. 110A.

The grounds upon which defendant bases his appeal is that the trial court failed to advise him, prior to the acceptance of his plea, of the possible minimum sentence as is required by Supreme Court Rule 402(a). At the hearing on October 11, 1973, when the defendant pled guilty to the charge that "he did unlawfully and knowingly sell and deliver to Richard K. Evans, agent of the Illinois Bureau of Investigation, 2.36 grams of a substance containing lysergic acid diethylamide", he was represented by private counsel. The court read the indictment to the defendant and the court was informed that the terms of the plea bargain agreement were from one to three years. This was verified by the defendant, by defense counsel, and by the State's Attorney. The court then admonished defendant that he had a right to plead not guilty; that he had a right to a jury trial; that by pleading guilty, he waived these rights; and that he also waived the right to confront witnesses. Then, the following colloquy occurred between the court and the defendant:

"Question: Now the maximum penalty provided by law for a conviction or a plea of guilty for the offense laid in this indictment could be up to ten years in jail or a fine of \$20,000 or both. You understand what the maximum penalty is?

Answer: Yes.

Question: In other words, I could sentence you from two to six, three and one-third to ten, do you understand that?

Answer: Yes, Your Honor."

After advising the defendant that the court was not bound by the plea negotiations, that no threats or promises other than the plea agreement had been made, and that a factual basis existed, the court accepted defendant's plea and upon waiver of a pre-sentence report, sentenced him to a term of one to three years according to the terms of the negotiated plea.

In People v. Leone, 7 Ill.App.3d 392, the trial court failed to explain the minimum sentence to the defendant, although he did explain the maximum, in open court as required by Supreme Court Rule 402(a)(2), but on appeal the court was "of the opinion that there is sufficient in this record to warrant affirmation". The court in the Leone case went on to say that the essentials of the rule were complied with and the defendant must be taken to have understood the effects of his plea of guilty.

In the present case, the trial court inquired of the defendant if he knew the terms of the negotiated plea, and he replied: "It is my understanding that if I plead guilty that I would get from one to three years." There were no other conditions of the negotiated plea. Defendant was represented by counsel of his choice from the very beginning of the proceedings when he was first brought into court until his plea of guilty six months later. Defendant's attorney is an able and experienced trial lawyer, and the trial court made certain that the defendant was satisfied with his lawyer's services and was fully aware of the consequences of his plea of guilty. The trial court's compliance with Supreme Court Rule 402 is letter-perfect aside from not mentioning the possible minimum sentence. In People v. Mendoza, 48 Ill.2d 371, the Supreme Court said "that the fact that defendant was not specifically admonished by the trial court as to every consequence of his plea did not sufficiently demonstrate that he was, in fact, unaware of these consequences". Rule 402 requires sub-

stantial compliance, and the record of the proceedings in the trial court when defendant pled guilty shows substantial compliance.

The judgment of the trial court of Jackson County is affirmed.

Judgment affirmed.

MORAN, P.J., AND CREBS, J., CONCUR.

PUBLISH ABSTRACT ONLY

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the Circuit Court of the Twentieth
) Judicial Circuit, St. Clair County.
)
vs.)
)
LOUIS AVERY,) Honorable Harold O. Farmer,
) Judge Presiding.
Defendant-Appellant.)

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Defendant appeals from a judgment of the trial court finding him guilty of the crime of arson and sentencing him to the Illinois State Penitentiary for a minimum of three years and a maximum of ten years after a finding of guilty by a jury.

The evidence disclosed that in the early morning hours of July 14, 1971, a building owned by Allison Korkegian was destroyed by fire. Ms. Korkegian was the defendant's landlady at and prior to the time of the fire.

She testified that she owned the house where defendant resided and he had not been paying his rent. When she gave him a five-day notice to move, he allegedly stated that he had a Seagram bottle filled with gasoline and that this was for his protection. She further testified that after she had asked the defendant to move, he had threatened her several times.

Randolph Watson testified that he lived at 805 Summit Avenue in East St. Louis; that he was well acquainted with the defendant and that about 5:00 a.m., on the morning of the fire, defendant came to Watson's home, awakened him and informed him that he had set fire to the Allison Korkegian property. Watson further testified that he and the defendant then went to his front door and he saw smoke coming from the direction of the Korkegian property. He later went over and saw the property burning.

Defendant contends (1) that the evidence presented at the trial was insufficient to show the existence of corpus delicti, (2) that the trial court's restrictions of cross-examination of the state's key witness was error, and (3) that the sentence imposed was excessive.

We find that no error of law appears, that an opinion in this case would have no precedential value and that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt.


We therefore affirm in accordance with Supreme Court Rule 23 (Ill. Rev. Stat., ch 110A, par. 23.).

Judgment Affirmed.

CONCUR:

Crebs, Carter, JJ.

PUBLISH ABSTRACT ONLY.

3D
21 I.A. 309
(24540-4M-9-70) 160-o 

STATE OF ILLINOIS

—
APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 8th day
of August A. D. 1974, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12207

Agenda No. 73-240

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee)
)
v.)
)
EDWARD HILL and FRANK HEAD,)
)
Defendants-Appellants)

Appeal from
Circuit Court
Vermilion County
72-CF-143

Mr. PRESIDING JUSTICE SMITH delivered the opinion of the court:

This is an appeal by the defendants from a sentence of one to three years in the penitentiary on a plea of guilty to burglary. In this case, counsel for the defendants moved to withdraw as counsel for the defendant Edward Hill and accompanied the motion with a brief in conformity with Anders v. State of California, 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396. The motion was continued for 60 days for the defendant to file any other further or additional suggestions and appropriate notice to him of this opportunity was given. None were filed. Defense counsel states that they have thoroughly examined the record, researched the issues raised by the defendant, investigated and evaluated other issues that might arguably support the appeal, but find that it is without merit and that a review of the case

would be frivolous in the absence of any justiciable issue. On this record, we agree and the judgment as to Edward Hill is affirmed.

The sole issue raised by defendant Head is that there was no factual basis for his plea as required by Ill. Rev. Stat. 1971, ch. 110A, par. 402(c). The mandate of that section is that, "The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea." Such determination was made by the trial court and we affirm.

The defendant was indicted with one Edward Hill. An attorney was appointed for them and they entered not guilty pleas. Later they advised the court they wished to plead guilty to the charge of burglary. The court then proceeded to admonish them as to the consequences of the plea and no deficiency in that admonishment is here indicated or asserted.

Hill was 50 years of age and the defendant 47, and both had a considerable history of alcoholism with resultant minor infractions with the law, and a lack of cooperation in endeavoring to cope with their drinking habits. The two gentlemen had been together on this occasion for about two hours. Hill admitted that he entered into a Ford van located in a back lot of a furniture company, that he broke the glass and removed a container or tool box from the van. Hill stated that Frank Head was not around the van at the time of the break-in and that he doubted that Head knew that he (Hill) was going to burglarize the van. Hill also stated that he had been drinking heavily

that night and was not clear as to just what had occurred. Head denied seeing Hill break the van window and denied that he knew that Hill was going to break into the van. Before Hill got the tool box out of the van, apparently the police arrived. In the meantime Head had left to get some cigarettes and had in his possession a stapling machine and a box of staples. He stated that he did not know that they were stolen. He told the police that Hill had approached him and handed him the articles. Hill likewise stated however that Head was on the other side of the truck when he broke the glass. The court inquired of Hill as to when Head came up to the truck and Hill replied, "He was already up, but he was on the other side of the truck." The court found that there was a factual basis for the plea.

The principal thrust of the defendant is that his plea of guilty to burglary was wholly insufficient where on inquiry he denied having participated in the crime or knowing that Edward Hill was planning such an act and therefore could not have had the requisite intention to commit a crime. The difficulty with this position is the long-recognized rule in Illinois that an inference of guilt arises where a person is in the unexplained possession of recently stolen proceeds of a burglary and this inference is sufficient to support a finding of guilt. (People v. Woods, 26 Ill.2d 557, 188 N.E.2d 1, cert denied 373 US 945, 83 S Ct 1555, 10 L Ed 2d 699.) The

defendant's statements exculpating himself in the face of his co-defendant's statement that he was standing beside the truck and the fact that he accepted the stapler and staples from Hill without question or inquiry and they were found in his possession suggest sufficient participation to warrant a conviction.

(People v. Street, 11 Ill.App.3d 243, 296 N.E.2d 606.) If such is sufficient to support a conviction, it would seem to follow that it furnishes a sufficient factual basis for the acceptance of a guilty plea.

The trial court considered probation and conditional discharge. It recognized that the initial charge would not in itself require imprisonment. In view of the fact, however, that in their previous experiences with the law and with alcohol, the defendants had been unable to rehabilitate themselves and had refused to cooperate, the court concluded that correctional treatment was required and that it could be most effectively provided by a prison sentence. In so doing, the court considered the defendants' past history of alcoholism and difficulty with the law and concluded that neither probation nor conditional discharge would be productive of such rehabilitation. We cannot say that the trial court abused its discretion nor can we say that there was an explicit denial by the defendant Head of his participation which was worthy of belief. The trial court exercised the discretion granted it under the law in accepting the plea. It heard and saw the witnesses. It was for the trial court to determine whether the events of the evening indicated

a concerted cooperation between the defendants. If so, then on the theory of accountability and on the theory that the defendant's explanation of his possession of the stapling machine and staples was hardly worthy of belief would seem to furnish a factual basis for the acceptance of the plea. We cannot say that it finds no support in this record. The judgment as to Head is affirmed.

The judgments of the trial court are affirmed.

Affirmed.

CRAVEN and TRAPP, JJ., concur.

State of Illinois)
 Appellate Court) ss.
 Second District)

At a session of the Appellate Court, begun and held
 at Elgin, on the 3rd day of December, in the year of our
 Lord one thousand nine hundred and seventy-three, within and
 for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L. L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
 June 6-1974 the Opinion of the Court was filed in
 the Clerk's office of said Court, in the words and figures
 following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 15th
v.	)	Judicial Circuit,
	)	Stephenson County,
JERRY LEE KEISTER,	)	Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A two-count indictment charged the 17 year-old defendant with burglary and theft of property valued in excess of \$150. Defendant pled guilty to theft and was placed on probation; the burglary count was dismissed on the State's motion.

On appeal, defendant claims that his prosecution as an adult violated the 14th amendment of the U.S. Constitution and §2 and §18, Article I, of the Illinois Constitution. He argues that under section 2-7(1) of the Juvenile Court Act (Ill. Rev. Stat. 1971, ch. 37, §702-7(1)), a 17 year-old female, charged with the same conduct, could not have been prosecuted as an adult and that therefore his prosecution as an adult was an unconstitutional denial of equal protection.

Under the authority of People v. Ellis, 57 Ill. 2d 127 (1974), this court rejected the same argument in People v. McGruder, (Gen. No. 72-254) _____ Ill. App. 3d _____ (1974). Also see People v. Seets, 57 Ill. 2d 213 (1974).

Judgment affirmed

GUILD, RECHENMACHER, J.J. - concur

72-342

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

AUG 6 1974

the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the Eighteenth
v.	)	Judicial Circuit,
	)	DuPage County, Illinois.
ARTHUR J. FUNDER,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

After a jury trial, defendant was found guilty of the offense of driving while under the influence of intoxicating liquor (Ill. Rev.Stat. 1973, ch. 95½, par. 11-501(a)), and fined \$125 and costs.

He appeals, contending that the complaint is invalid, that the State failed to prove the elements of the offense, that the court erred in ruling on the admission of evidence, and improperly instructed the jury by defining the term "driving while under the influence of intoxicating liquor".

DuPage County Deputies Ammons and Zenisek observed a car with its lights on parked in a closed gas station in Carol Stream at approximately 11:20 P.M. on March 9, 1972. As they pulled into the station the officers observed the car pull out. They followed defendant and stopped him after he had traveled some two or three blocks. Officer Ammons exited his vehicle and observed that the defendant stumbled as he got out of the car. The defendant produced

his driver's license upon request. The officer testified that he detected a moderate odor of alcohol on defendant's breath. In answer to questions, defendant said he was coming from the "Back Door" restaurant in Geneva and was going home. Ammons testified that defendant showed some confusion in receiving directions on how to get home and that he told defendant that he should stay in the parking lot, sleep it off and later go home, and that after several explanations defendant agreed.

The officers, some moments later, saw defendant's car proceeding on the highway, followed it for about a mile and one-half, in the course of which they observed defendant's car swerve several times in his own lane on Gary Avenue. Then they saw defendant's car swerve across the center line of Gary Avenue south of the intersection with North Avenue, nearly causing a collision with oncoming traffic. After defendant had proceeded across North Avenue the officers stopped defendant, placed him under arrest and advised him of his constitutional rights.

From the testimony of the officers it appears that defendant said he had three brandies and waters between 8 and 10 P.M. after a full dinner. They noticed that defendant's speech was slurred. Defendant was, for the most part, cooperative. Physical tests were administered and the officers testified that defendant staggered while walking, had difficulty with his balance while standing, and had difficulty in touching the tip of his nose with his index finger. Defendant upon request wrote his name on an alcohol influence report form.

Officer Zenisek additionally testified that in his opinion defendant was intoxicated.

Defendant testified for the sole purpose of identifying his signature on certain checks which he had written shortly before

and after March 9, 1972. A witness who was with defendant during the course of the evening of March 9th testified that defendant had dinner and three alcoholic drinks between 6:30 and 10:15 P.M. in the Back Door restaurant, and that from the witness's observation defendant appeared normal in every way. Another witness testified to repairs made on defendant's car to correct a steering problem which he stated were only finally completed after March 9th.

Defendant first contends that the court should have granted his motion for a directed verdict at the close of the State's evidence. He argues that the evidence obtained by the police during the prior encounter with defendant should have been suppressed at trial, that the State's evidence was not sufficient to prove the elements of the offense and defendant's guilt beyond a reasonable doubt.

Defendant concedes that the physical observations made by the deputies in the first encounter are not protected by the constitutional right against self-incrimination. (People v. Mulack (1968), 40 Ill.2d 429, 432.) He claims that it was error, however, to allow Deputy Ammons to testify to various conversations between defendant and the deputy. But the defendant at trial did not object nor move to suppress the testimony of either the observations by the officers or the conversations between defendant and Officer Ammons at the initial confrontation; nor did defendant specifically raise the issue of the admissibility of this evidence in his written post-trial motion. Under the circumstances here, this contention of error is therefore unavailable to the defendant. People v. Linus (1971), 48 Ill.2d 349, 355; People v. Blumenshine (1969), 42 Ill.2d 508, 514-515.

Similarly, defendant's claim that statements made by him in the squad car after his arrest should not have been admitted because, although Miranda (Miranda v. Arizona (1966), 16 L ed 2d

694) warnings were given it was not shown that defendant understood them, is subject to the same bar. Again defendant did not object nor specifically raise the issue in his post-trial motion.

The defendant did object at trial to the testimony of an alleged statement by defendant in the squad car after the Miranda warnings were given but we find that the court committed no error in denying the objection. The officer testified that the defendant stated several times that he wished the officers would contact someone from the South Elgin Police Department, that they would help him get out of this situation. The statements were volunteered by defendant without solicitation by the officers and were not the result of custodial interrogation within the purport of Miranda.

Defendant's argument that the elements of the offense were not proved and that there is a fatal variance between the complaint and the proof is based upon the fact that the Uniform Traffic Ticket Complaint alleged that the offense occurred on Gary Avenue north of Route 64 in Carol Stream, whereas the proof showed that the erratic driving which the officers observed occurred on Gary Avenue south of Route 64. The evidence does not factually support defendant's inference that defendant was not driving while under the influence of intoxicating liquor north of Route 64 in view of Officer Zenisek's testimony that defendant had proceeded on Gary Avenue across North Avenue in a northbound direction before he was stopped. The substantial elements of the charge of driving while under the influence of intoxicating liquor are (1) that a defendant is driving or in control of a motor vehicle on a public highway in the State of Illinois and (2) at that time, is under the influence of intoxicating liquor (Ill.Rev.Stat. 1973, ch. 95½, par. 11-501(a); and see People v. Jefferson (1971), 1 Ill.App.3d 484, 486). These elements were sufficiently alleged and proved.

Defendant contends that there was no proof beyond a reasonable doubt that defendant was under the influence of intoxicating liquor. He argues that the absence of scientific evidence (citing People v. Mundorf (1967), 85 Ill.App.2d 244), the testimony that the officers smelled only a moderate odor of alcohol on defendant's breath (citing People v. Sullivan (1971), 132 Ill.App.2d 674), and evidence that defendant was cooperative (citing People v. Evans (Abst. 1971), 132 Ill.App.2d 792), are sufficient to raise a reasonable doubt of his guilt. While each of the factors mentioned may bear on the result in a particular case the whole record here distinguishes the cases and supports the jury verdict finding defendant guilty of the offense charged beyond a reasonable doubt. (See People v. Brower (1971), 131 Ill.App.2d 548; People v. Zellmer (Abst. 1972), 3 Ill. App.3d 858.) The defendant admitted to some drinking; there was evidence of erratic driving, including a near collision in the wrong lane; defendant's speech was slurred, he stumbled, was confused, had difficulty with the physical tests; and, in an experienced officer's opinion, was under the influence of intoxicating liquor. There was no testimony of illness or disease which would account for defendant's actions and the jury was not required to believe that the evidence of a steering defect was sufficient to explain the erratic driving. Under these circumstances the reviewing court should not substitute its opinion for the finding of the jury on the conflicting testimony.

Defendant's other claims of errors in the trial are not persuasive. The court did not err in admitting and permitting the jury to compare defendant's signature on two cancelled checks and his driver's license with his signature on the alcoholic influence report. Defendant argues that the comparison would have no relevance to the issue of intoxication. The fallacy in the argument

is illustrated by the fact that the defendant himself introduced two of the checks drawn shortly before and after March 9, 1972, presumably to show a normal signature and to cast doubt on the claim that he was intoxicated. He may not complain of the admission of evidence of the same type he has himself offered. People v. Holloman (1970), 46 Ill.2d 311, 318-319.

Defendant finally contends that the court erred in giving, allegedly over his objection, the following instruction:

"Under the influence of intoxicating liquor, or beverage, is defined as that condition in which a person has consumed sufficient alcohol as to affect his nervous system, brain, or muscles to the extent so as to impair to an appreciable degree his ability to operate a motor vehicle in the manner that an ordinary, prudent and cautious man in full possession of his faculties would drive or operate a similar vehicle."

He argues here that the instruction defines fact rather than law and invades the province of the jury. (But see People v. Ash (1974), 16 Ill.App.3d 633, 636.) The transcript does not contain the conference on instructions so that we are unable to review the objection allegedly made at trial. (People v. Irwin (1965), 32 Ill.2d 441, 443-445.) The issue, moreover, was not preserved in defendant's post-trial motion and defendant is deemed to have waived the error, if any. People v. Neukom (1959), 16 Ill.2d 340, 349.

For the reasons stated, we conclude that the defendant has been proven guilty of the offense charged beyond a reasonable doubt in a trial free from prejudicial error. We, therefore, affirm the judgment below.

Affirmed.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Seventeenth
v.	)	Judicial Circuit,
	)	Winnebago County,
JESSE RODRIQUEZ,	)	Illinois.
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Jesse Rodriguez, filed a pro se petition for a writ of Habeas Corpus in connection with each of four charges under which he was imprisoned after judgments of conviction based on violation of the Illinois Controlled Substances Act (Ill.Rev. Stat. 1971, ch. 56½, par. 1401(b)). Counsel was appointed to represent defendant on the hearing of his petitions and after the hearing the court denied the petition in each case. Defendant has appealed.

The court-appointed counsel on appeal has petitioned for leave to withdraw after filing a brief as required by Anders v. California (1967), 386 U.S. 738, and People v. Jones (1967), 38 Ill.2d 384. The defendant has received notice of the motions to withdraw and has been given permission to file any additional matters but none have been filed. We consider the case on the

basis of the entire record, together with the petition and brief of counsel.

The habeas corpus petition is based on the theory that the amount of bond set on each charge was excessive to the point of denying bail for all practical purposes and therefore that the court was deprived of jurisdiction over the defendant. The record shows that subsequent to the denial of defendant's habeas corpus petition on August 16, 1973, defendant moved in this court to reduce bond and his motion was denied. Defendant thereafter pleaded guilty to the indictment numbered 2076 pursuant to plea negotiations in return for an agreed sentence of not less than three nor more than nine years and the dismissal of indictments numbered 2075, 2077 and 2078. As counsel points out, the review of an order denying bond prior to trial cannot be sought after conviction. People v. Harris (1967), 38 Ill.2d 552, 555.

Non-jurisdictional errors, even of constitutional proportions are not reviewable by habeas corpus. (People ex rel. Palmer v. Twomey (Abst. 1972), 4 Ill.App.3d 90.) Counsel has considered whether there are any jurisdictional errors which could be reviewable under the writ of habeas corpus and has concluded that there are none. We agree. Here the indictments sufficiently charged an offense to confer subject matter jurisdiction over the defendant. The indictments charged defendant with delivery of a controlled substance essentially in the language of the statute; and similar language has been held sufficient in People v. Allen (1970), 130 Ill.App.2d 510, 511-512. (See also People v. Adams (1970), 46 Ill.2d 200.) While the failure to name the person to whom the substance has been sold or delivered would not have created a fatal variance (People v. Adams), 46 Ill.2d 200, 203), the State has named the person to whom the controlled substance was delivered in each indictment.

We conclude that the issues raised are illusory. From our examination of the entire record we find no substantial basis for defendant's appeal and hold that it is without merit.

The motions to withdraw are therefore allowed and the judgments of the trial court are affirmed.

Motions to withdraw allowed, judgments affirmed.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.

72-278

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
AUG 6 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court for
v.	)	the 19th Judicial
	)	Circuit, Lake County,
MORRIS JOHN, JR.	)	Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant was indicted for the offenses of armed robbery, robbery and aggravated battery. The State nolle prossed the robbery charge, and a jury found defendant not guilty of aggravated battery but guilty of armed robbery. He was sentenced to serve 5 to 15 years in the penitentiary.

On November 28, 1970, at approximately 4:30 p.m., the defendant entered a tavern; after drinking half of a second glass of beer, he moved to the side of the bar, called to the bartender, drew a pistol and demanded his wallet. The bartender responded that he had neither a billfold nor any money and started to walk away. Defendant moved into the barroom area flourishing the pistol, ordered everyone to lie on the floor and collected the patrons' billfolds, placing some in his pocket and some in a paper bag. During this process, defendant shot and wounded one of the patrons. Before exiting, he took an

additional \$260 (approximate) in bills from the cash register and the bartender's wallet.

Within five or ten minutes of the occurrence, two deputy sheriffs arrived and questioned the victims who described the offender as a thinly-built, light-complected black, 25 to 30 years of age, 5'9" to 5'10" tall, weighing about 175 pounds, wearing dark clothing, a black leather jacket, white buck shoes and a golf-type cap with its long visor pulled low over his forehead. Arriving shortly after the deputies, a state trooper received the description of the offender and began circling the tavern area, block-by-block, in his squad car. Approximately 3 blocks south of the tavern, he saw a man step from behind a tree at the side of the road; except that the man was hatless, he and his clothing fit the description given by the victims. The man (whom the trooper identified in court as the defendant) told the trooper, upon questioning, that his car had run out of gas and that a friend had left to get some. The trooper requested that defendant accompany him to the tavern. Defendant was unwilling, a short struggle ensued and defendant was ultimately handcuffed and driven to the tavern. There, on entering, defendant was immediately identified by the victims as the person who had held them up.

Three Waukegan policemen who were present when defendant was taken into custody and when he was identified at the tavern, returned to the area in which he had been apprehended and saw what appeared to be a \$10 bill blow across the headlights. Directing the squad car's spotlight toward the area from which the bill seemed to come, they discovered what, on closer inspection, proved to be a torn paper bag laying on the ground; 5 wallets, \$345 in bills and \$2 in change were lying on top of the bag, and leaves and branches were scattered over the whole. The wallets were later identified as belonging to the

robbery victims. The next day, 2 more of the stolen wallets were found near the tavern. Defendant's cap and pistol were never found.

During trial, defendant testified that at approximately 4:15 p.m. on the day in question he made a purchase at a North Chicago liquor store and, while enroute to a Waukegan store, picked up a hitchhiker, one Jerry Wolkman whom he previously knew. Defendant described Wolkman as being about the same weight and general build as himself, a little darker complected, unshaven, mustached, and dressed at that time in dark coveralls, black leather jacket, white gym shoes and a dark-colored, visored cap. Defendant asserted that he accepted Wolkman's offer to pay for a ride to Zion; that enroute through Waukegan, in response to Wolkman's request, he pulled to the side of the road; that the two talked for 10 or 15 minutes and Wolkman got out of the car; that his auto failed to start, he called Wolkman back and the two pushed the auto to the rear of the tavern herein involved. According to defendant, Wolkman then departed, heading north, while he (defendant), at the advice of an elderly man who was entering the tavern, headed south for mechanical assistance. He testified that he had been unable to locate the hitchhiker and that he had not seen him since that day.

A deputy sheriff testified that after the robbery he was informed by the bartender that there was, parked behind the tavern, an auto which did not belong to any of the patrons. Upon opening the door of that car, the officer found an empty holster on the floor alongside the driver's seat. (Defendant asserted that the holster was not his but that it probably belonged to one of the Marines who used his car to go to a shooting range.) The officer found the car radiator lukewarm. Upon calling for verification of ownership, the officer was informed that the auto was registered to the defendant. After the auto had been towed to the sheriff's parking lot, the deputy was able to start the auto and allowed it to run for a minute or more.

Four issues are raised on appeal.

Defendant contends that the one-man show-up procedure at the tavern raised a substantial likelihood of misidentification. We disagree. While the practice of single-suspect show-ups has been condemned, the procedure has been justified under certain circumstances, e.g., where it is apparent that the witnesses had an excellent opportunity to observe the defendant during the commission of the crime (People v. Speck, 41 Ill. 2d 177, 193 (1968)) and where a prompt identification or lack of identification would be determinative of whether officers should continue their search for the described suspect. People v. McMath, 45 Ill. 2d 33, 36 (1970), cert. den., 400 U.S. 846, 27 L. Ed. 2d 83, 91 S. Ct. 92 (1970). Also see People v. Rodgers, 53 Ill. 2d 207, 213 (1972).

On the day of trial, the assistant state's attorney showed the eyewitnesses who would be called to testify, two photographs of defendant in which he wore a mustache. Since the eyewitnesses had not previously mentioned to the police that the robber had worn a mustache, defendant asserts that the in-court identification (14 months after arrest) was in fact based upon the photographs and that he was thus subjected to the irreparable effect of misidentification. He also objects to the fact that on the morning of trial, one of the eyewitnesses was shown defendant's white shoes. While the practice of displaying a defendant's photograph to witnesses just prior to trial has been strongly disapproved, it must be determined whether the in-court identification was unduly influenced by the procedure or whether the identification was independently based. (People v. Martin, 47 Ill. 2d 331, 336-39 (1970), cert. den., 403 U.S. 921, 29 L. Ed. 2d 700, 91 S. Ct. 2240 (1971); People v. Rodgers, *supra*, 212-13.) Here, the record demonstrates that, despite minor conflicts in the early descriptions which eyewitnesses gave to the police, the patrons had been particularly cognizant of defendant during his time in the tavern because he was the only black man present, they had had ample opportunity before and during the robbery to register his appearance,

and all of them had immediately identified defendant as the robber when he was brought into the tavern. Identification testimony went beyond that which could have been influenced by the display of the photos or of the shoes.

Relying upon United States v. Ash, 461 F. 2d 92 (1972), defendant claims that by showing the photos without the presence of defense counsel, he was deprived of his constitutional right to counsel at a critical stage of the proceedings. We find no merit to this contention in light of the fact that, subsequent to the filing of defendant's brief, the case relied upon was reversed. (United States v. Ash, 413 U.S. 300 , 37 L. Ed. 2d 619, 93 S. Ct. 2568 (1973).) The Supreme Court held that the sixth amendment does not grant the accused the right to have counsel present at a state-conducted post-indictment photographic display conducted for the purpose of allowing a witness to attempt an identification of the offender. See also, People v. Holiday, 47 Ill. 2d 300, 306-07 (1970); People v. Hayes, 52 Ill. 2d 170, 173-74 (1972).

Defendant's assertion that the circumstantial evidence offered was insufficient to ascertain guilt beyond a reasonable doubt is based upon the assumption that the identification procedures were invalid and the identification testimony inadmissible. Having held that the identification procedures were justified and that the identification testimony was independently based, the direct evidence alone was sufficient to convict. In addition, however, the circumstantial evidence strongly supported the direct evidence.

Finally, defendant contends that his sentence is excessive considering that he had no prior record of adult convictions, had at one time held a part-time job as a Pinkerton Security agent, had completed 26 hours of junior college work while in the Navy and was decorated for outstanding valor during combat duty in Viet Nam. He further maintains that under the Unified Code of Corrections the minimum sentence for armed robbery is 4 years. In light of these facts, he requests that

this court apply the one-third rule and reduce his sentence to 4 to 12 years.

At the time of defendant's crime, a first conviction for armed robbery called for a mandatory minimum sentence of 2 years. (Ill. Rev. Stat. 1969, ch. 38, §18-2(b).) Under the new statute, armed robbery is classified as a class 1 felony. (Ill. Rev. Stat. 1973, ch. 38, §18-2(b).) While it is true that the ^{Unified} Code of Corrections establishes a minimum of a 4 year sentence for class 1 felonies (Ill. Rev. Stat. 1973, ch. 38, §1005-8-1(c)(2),) the Code's provisions are applicable only if they call for a lesser sentence than that in effect at the time prosecution was commenced. (Ill. Rev. Stat. 1973, ch. 38, §1008-2-4.) Thus, the provisions of the Code do not require the reduction of sentence in the instant case. (See People v. Killebrew, 55 Ill. 2d 337, 342-43 (1973).) Additionally, it should be noted that the one-third rule does not apply to class 1 felonies. (Ill. Rev. Stat. 1973, ch. 38, §1005-8-1(c).) From our review of the evidence, we find that the sentence imposed was not excessive.

For the foregoing reasons, the judgment of conviction and the sentence imposed are affirmed.

Judgment affirmed

SEIDENFELD, RECHENMACHER, J.J. - concur

211A^{3D}354

(24540-4M-9-70) 160-0



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE HAROLD R. CLARK, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 31st day
of July A. D. 1974, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12204

Agenda 74-88

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
MEL EDDIE EDWARDS,	)	McLean County
	)	71-CF-771
Defendant-Appellant)	

Mr. JUSTICE CLARK delivered the opinion of the court:

The defendant was convicted of theft of property in value over \$150, and was sentenced to serve from 4 to 10 years in the Illinois State Penitentiary. Thereafter, this court entered an order reducing the defendant's minimum sentence to a term of 3 years and 4 months to comply with the new Code of Corrections. Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(c) (4); ch. 38, par. 16-1 (e) (2).

On appeal, he raises three issues: (1) sufficiency of the indictment; [This issue was waived by defendant's attorney at the time of oral argument before this court.] (2) the State failed to prove beyond a reasonable doubt that the property allegedly

taken had a value in excess of \$150; and (3) the trial court should have suppressed as evidence the bag of coins seized from the trunk of the automobile in which the defendant was present when arrested. We disagree and affirm.

The defendant and a companion were arrested during the early morning hours of August 16, 1971 and charged with illegally emptying parking meters in a municipal parking lot in Bloomington.

On October 6, 1971, a McLean County grand jury returned an indictment charging "that Mel Eddie Edwards on the 16th day of August, 1971, at the parking lot at the corner of East and Monroe Streets, Bloomington in the County of McLean and State of Illinois, committed the offense of Theft over \$150 in that he did knowingly obtain unauthorized control over United States coins in the amount of approximately \$336.00, such coins being owned by the City of Bloomington, with the intent to deprive the owner permanently of the use and benefit of said property in violation of Section 16-1, Chapter 38, Illinois Revised Statutes."

After several delays relating to appointment of counsel and other matters, on July 14, 1972 defendant filed a motion to suppress all evidence or contraband taken from the car in which he was riding when arrested. The motion stated that stopping and detaining such vehicle was done without probable cause or belief that any crime had been committed, or was being committed in the presence of the detaining officers, and further that the officers had no warrant to search and no consent was given.

On July 14, 1972 a hearing was held on the motion to suppress, and three Bloomington police officers testified. The officers' testimony was as to the effect that shortly after midnight on the morning of August 16, 1971, they went to the Bloomington parking lot next to the General Telephone Company building in response to a telephone call from an employee of the telephone company. They were advised that the parking meters were being rifled by two men. The two telephone company employees told the police that the men they had observed in the parking lot had just left in a white-over-black 1970 Ford bearing a red out-of-state license plate. They also gave them the two-letter prefix and first number of the license plate. Immediately after leaving the parking lot and about one-and-one-half blocks away, the defendant and a companion were observed by the police sitting in an automobile matching the above description. It was parked and had just turned off its lights. The two men were asked to get out of the car. After they were outside the car, the men were handcuffed and advised that they were under arrest for taking money from parking meters. Using a flashlight to examine the interior of the car, the officer found a paper bag containing change on the floor of the passenger side. One of the officers then opened the trunk of the automobile with a key which he found either in the ignition or on the front seat. In the trunk another grocery sack of coins was found. The officers had no search warrant nor was consent given to open the trunk. Following the hearing, the court denied the motion to suppress on the grounds

that the search of the trunk, as well as the interior of the automobile, was a valid search incident to a lawful arrest.

The trial was held on November 13, 1972. The State first called the two employees of the telephone company who were working in the building next to the city parking lot where the parking meters were located. Tom Brucker testified that shortly after midnight on August 16, 1971, while he was in the alley outside the telephone building he heard what he believed to be the sound of money jingling. He observed two individuals in the adjacent parking lot, one of whom was wearing a light colored jacket, either white or light brown, going from meter to meter. The other individual was standing near a light standard at the corner of the parking lot. Brucker testified that he entered the telephone building and called the police department to tell them that money was being taken from the parking meters. After completing that call, he informed two other co-workers of the events and they all went to a window and watched the parking lot. At that time they observed both men in the center of the parking lot going from meter to meter and thereafter they entered a black and white 1970 Ford bearing a maroon license plate whose first three characters were "IN-7". He further testified that when a police car arrived approximately thirty seconds later, he related the above to the officers and told them the direction in which the automobile had left. Brucker could not describe the men other than that one of them was wearing a light-colored jacket and he drove the car when it left. The other telephone company employee was

called and corroborated Brucker's testimony, but was also unable to identify either of the two men he had observed in the parking lot.

At the trial, four police officers who were at the scene testified. Officer Kincaid, whose testimony at the hearing on the motion to suppress was related above, testified that he received the above information from the telephone company employees, and immediately left the parking lot. Nearby he discovered an automobile matching the description and occupied by two individuals. He identified the defendant as being the man riding in the passenger side of the car. While looking inside the car with a flashlight, the officer observed a brown grocery sack containing change sitting on the floor board with loose coins scattered around it. The defendant was then searched and a quantity of coins were taken from his front left trouser pocket. The envelope containing the change taken from defendant's trouser pocket was marked as an exhibit, properly identified, and admitted into evidence. The grocery sack of change found on the front passenger side floor board where the defendant was sitting was also identified and admitted into evidence.

Officer Swearingen was called next, and he also identified the sack of coins taken from the front floor board. He further testified that another brown grocery sack of coins was taken from the trunk of the automobile. Officer Bauer testified that after the defendant got out of the passenger side of the automobile both men were handcuffed. The officer found and removed a key from the front

of the vehicle. Upon orders of the senior officer present, he opened the trunk and found several large folded grocery bags, and one containing coins, which he identified. Bauer stated that he did not get the key from either of the men, and that it was either in the ignition or on the front seat. He further stated that at the time he took the key and opened the trunk, both subjects had been placed under arrest and moved back away from the car.

Officer Kaiser testified that he aided in the arrest and that he approached the driver's side of the automobile, ordered the driver out, advised him of his rights, and upon searching the driver, discovered a key in the left-hand pocket of his jacket. He took the key to the parking lot adjoining the telephone building and found that it fit the locks of the meters located there. Officer Kaiser discovered that forty-five of the meters in the lot were empty.

Detective Mountjoy testified that he was responsible for receiving and counting the various sacks of change here involved. He testified that the coins found in the pocket of the defendant consisted of \$18.25 in quarters, \$12.70 in nickels, \$15.40 in dimes, and two pennies, for a total of \$46.37. He further testified that the coins found on the front floor board of the automobile consisted of \$29.00 in quarters, \$15.70 in nickels, \$16.70 in dimes, and six pennies, for a total of \$61.46; and that the sack found in the automobile trunk contained \$61.50 in quarters, \$76.45 in nickels, \$90.30 in dimes, and \$.64 in pennies for a total of \$228.89.

The State called the city employee responsible for the

operation of the parking meter system. He testified that in the parking lot adjoining the General Telephone Building, the meters had a four-hour limit, and that one could deposit quarters, dimes and nickels and receive time. The meters would also accept pennies, but no time would be received for them. He testified that the meters in that lot were emptied once each week, normally on Tuesday mornings. Each meter would normally contain an average of between five to seven or eight dollars each week. He further testified that around August 16, 1971, it was brought to his attention that there had been unusual happenings in the General Telephone lot, and that he checked the meters on August 17, discovering that there was a shortage in that block and that there were also funds missing in the on-street meters in the area.

The defense recalled the telephone company employee Brucker, who testified that when he observed the two men in the parking lot adjacent to the telephone building, he did not see anything in their hands nor did he ever see the trunk lid of their car opened. The defense also recalled officer Kincaid, who again testified that when he first approached the black and white automobile occupied by the defendant and his companion, the car had apparently just parked, the lights were just being turned off. The defendant and his companion were still inside the car. He stated that at no time did he ever see the defendant near the trunk of the automobile. The defense recalled officer Kaiser, who testified that when checking the meters in the parking lot with the key he had taken from defendant's

companion, he discovered that two of the meters still had money in them, and he identified a sack containing that money which totalled \$7.10. Officer Bauer also testified for the defendant, and stated that the identification card in the 1970 Ford automobile indicated that it belonged to the driver of the automobile, Albert Green, rather than the defendant.

The defendant was found guilty of theft over \$150 by the jury on November 14, 1972.

The first point raised on appeal relating to the sufficiency of the indictment was waived at the time of oral argument before this court; therefore, only two issues will be discussed in this opinion.

The appellant raises the question as to whether the State proved beyond a reasonable doubt that the property allegedly stolen had a value in excess of \$150. Clearly, value is a material element of the offense of theft, and must be proven by the State. In order to sustain a felony conviction for theft rather than a misdemeanor, the value of the stolen property must be proven beyond a reasonable doubt to be in excess of \$150. (People v. Kurtz, 69 Ill.App.2d 282, 216 N.E.2d 524, affirmed in part and remanded, 37 Ill.2d 103, 224 N.E.2d 817.) If the indictment alleges the value to be in excess of \$150, but the proof shows the value to be less than \$150, it does not constitute a fatal variance; however, the court imposing sentence is limited to a misdemeanor sentence.

In order to prove the instant charge of theft over \$150,

stated to be coins in the amount of approximately \$336 from the municipal parking lot, the State must prove that the defendant took possession, with required intent, of a sack of coins found in the trunk of the automobile. The issue is whether the State proved beyond a reasonable doubt that all the money came from the parking lot, and whether there was sufficient evidence that the money found in the trunk of the automobile was taken by the defendant. It is well settled that the trier of fact may draw inferences from the facts presented by the evidence, and these inferences should be accepted on appeal unless they are inherently impossible or unreasonable. (People v. Dunham 13 Ill.App.3d 784, 300 N.E.2d 328.) In this case all the evidence against the defendant is circumstantial, albeit strong. There are no witnesses positively stating that they saw the defendant in the parking lot, or that they saw the defendant take money from the parking meters, or that the money found in defendant's possession came from the parking lot. However, the strong circumstantial evidence is that the defendant's companion was wearing a jacket described by witnesses, the defendant and that companion were apprehended in a car well described by the witnesses a short time and distance from the scene of the offense in the early morning hours, the companion had a key which fit the meters, the defendant had a substantial sum of small change on his person, a large amount of change was found in a sack near his feet on the floor boards, and a larger amount of change was found in the trunk of the car.

In this case, the jury heard and considered all the in-

criminating circumstantial evidence at the time and place of the arrest; and likewise considered all the factors, which defendant contends creates a real lack of certainty that the coins were all stolen from the meters in the parking lot, or that defendant even knew about the coins in the trunk. The defendant contends that a judgment of conviction which rests upon circumstantial evidence that raises little more than a suspicion against the accused requires a reversal by the reviewing court, citing People v. Dennison, 7 Ill.App.3d 675, 288 N.E.2d 516. In the instant case, the jury could well find the circumstantial evidence established the guilt of the defendant beyond a reasonable doubt.

The last issue raised by the defendant is that the search of the trunk of the automobile in which he was present at the time of his arrest was unreasonable, and that the failure to suppress from evidence the sack of coins taken therefrom was error. The evidence shows the arresting officers were acting on reliable information from two eye witnesses, and they had probable cause to stop and arrest the defendant and his companion. They were justified in seizing the coins from defendant's person and from the floor of the automobile where he was sitting. However, after the defendant and his companion were arrested and handcuffed, the police officer got a key from the front of the car, and without the consent of the defendant or owner of the automobile, unlocked and searched the trunk, finding the other bag of coins. The defendant contends that this act transformed the original search, which was reasonable in

its inception, into one which violated the fourth amendment by its intensity and scope.

In its brief, the State argues that the defendant did not have standing to challenge the search of the automobile in which defendant was riding on the night of his arrest. The issue of standing was not raised by the State in the trial court at the hearing on the defendant's motion to suppress, and, therefore, the State has waived the right to present the question on appeal. People v. McAdrian, 52 Ill.2d 250, 287 N.E.2d 688.

The court having now determined in this case that the defendant has standing to complain of the use of the evidence against him obtained from the trunk, it must next be determined whether the search of the trunk and seizure of coins therein were legal.

On this question, the State relies chiefly on the so-called "automobile exception" of Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, where the Supreme Court held the warrantless search of an automobile valid, based upon the exigencies involved due to an automobile's mobility. The Court further stated that the fourth amendment guarantee of freedom from unreasonable searches and seizures, involves a recognition of a necessary difference between the search of a place of business or dwelling house for which a proper search warrant could be readily attained, and on the other hand, a search of an automobile which could be quickly moved out of the jurisdiction. It should be noted that the Carroll case involved the unusual circumstance where there was no search warrant, no arrest

warrant nor valid arrest preceding the search and seizure. The case holding that the right to search the automobile was not dependent on the right to arrest, but was dependent on the reasonable cause which the police officer had for a belief that the contents of the automobile were contraband.

The search and seizure in this case is valid under the case of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419. In that case the police received reports from a robbery victim and two eye witnesses describing the automobile used in the crime and several of the suspects. Arrests were made shortly thereafter, but the car was not searched until taken to the police station. The Court stated that the search at the police station was valid, if there was probable cause to believe that the car contained contraband. The search could not be justified as being incident to the arrest. The Court noted, however, that it had long distinguished between automobiles and a home or office, reaffirming the Carroll case.

In the instant case, there was a valid arrest and probable cause to search the trunk of the automobile. The automobile had been described by witnesses as being used in the offense. Coins were discovered on the floor boards prior to search of the trunk. The police had no foreknowledge of the automobile being involved, which would have given them an opportunity to obtain a search warrant.

From a consideration of all the facts in evidence, there was probable cause for the arrest and for the police to search the trunk of the automobile.

For these reasons, the judgment and sentence of the circuit court of McLean County is affirmed.

JUDGMENT AFFIRMED.

SMITH, P.J., and CRAVEN, J., concur.



73-205

People vs Robert Drake

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present— PC

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
August 6, 1974 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Will County.
)	_____
vs.)	
	)	Honorable
ROBERT DRAKE,	)	Michael A. Orenic
	)	Presiding Judge.
Defendant-Appellant.)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Will County wherein defendant Robert Drake was found guilty of the crime of indecent liberties with a child, pursuant to which he was sentenced to a term of imprisonment of not less than four (4) nor more than twelve (12) years. The Office of the State Appellate Defender was appointed to represent defendant in the appeal in this Court. Such Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender states in his motion that a careful examination of the record supports his conclusion that an appeal would be wholly frivolous and could not possibly be successful in this case. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

It appears from the record that there was neither a formal or substantive defect on the face of the indictment for indecent liberties. Defendant appeared in court with his counsel for a hearing to determine his fitness to stand trial. No request for a jury appears on the record and the court, therefore, properly acted as the trier of fact (Ill. Rev. Stat. 1973, ch. 38 §1005-2-1(d)). The parties, by stipulation, agreed to submit the question of competency on the reports of two examining

psychiatrists. On the basis of such evidence, the court found the defendant competent to stand trial. Thereafter, the court furnished defendant with a copy of the indictment and required him to plead.

Defendant then tendered a plea of guilty. Prior to accepting defendant's plea, the court informed defendant of and was advised by defendant that defendant understood the nature of the charge, the minimum and maximum sentences prescribed by law at the time for the offense and under the new Code, and the right of defendant to persist in a plea of not guilty. He was also advised of his right to trial by judge or jury and the right to confront and cross-examine witnesses. Defendant told the court that he waived his right to a trial and the court determined that defendant's plea did not result from force, threats or promises. At the request of the court, defense attorney stated the terms of the plea agreement in open court and the trial court then stated that the court concurred in the agreement and determined that defendant understood and voluntarily agreed to it. The prosecutor also supplied the factual basis for the defense and defendant verified the facts which were stated. The proceedings complied with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A §402). On January 31, 1973, the court entered judgment as indicated and also sentenced defendant. Prior to sentencing, the court requested arguments from counsel on sentencing alternatives and afforded defendant an opportunity to make a statement on his own behalf. All parties declined the opportunity to speak. Thereafter, in accordance with plea negotiations, as well as defendant's election to be sentenced under the provisions existing prior to the enactment of the Code of Corrections, the court imposed the sentence of not less than four (4) nor more than twelve (12) years. The sentence is the minimum prescribed by law for the offense to which defendant pleaded guilty.

On the basis of the record in this cause, therefore, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and could not possible succeed. The judgment of the Circuit Court of Will County is, therefore, affirmed, and the motion of State Appellate Defender to withdraw as counsel for defendant Robert Drake is allowed.

Judgment Affirmed and
Withdrawal Motion Allowed.

74-193

STATE OF ILLINOIS

People vs Floyd De Benedetti



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present— PC

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

August 5, 1974

the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	Will County
)	
FLOYD DE BENEDETTI,)	
)	
Defendant-Appellant.)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Will County wherein defendant was found guilty of burglary and sentenced to a minimum of six (6) years and a maximum of twenty (20) years in the penitentiary. The office of the State Appellate Defender was appointed to represent defendant in the appeal in this Court. Such Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender states that a careful examination of the record supports the conclusion that an appeal would be wholly frivolous and without possibility of success. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

It appears from the record that defendant Floyd DeBenedetti and a Gerald Smith were jointly indicted for a burglary of an electric corporation. A motion to suppress a confession on behalf of defendant was denied after a hearing. The action against defendant Smith was severed and the case against defendant DeBenedetti proceeded to trial by jury. As indicated, defendant was found guilty of burglary.

At the hearing on the motion to suppress the confession, evidence was presented showing that defendant was incarcerated at approximately 1:30 P.M. on

April 30, 1973, and that prior to the making of the confession, defendant was informed of information obtained by the police implicating defendant in the burglary. At approximately 9:30 P.M. defendant asked the jailer to call for the detectives as he was prepared to "talk". Appellant's statement was recorded on tape after he had been advised of his constitutional rights and appellant was not coerced into confessing and no threats or promises were made to him. Defendant now contends that the confession was made only to stop the jailers from repeatedly questioning him while he was attempting to get some needed sleep. This contention is not supported by the record.

A confession is voluntary only if the maker's will is not overborne at the time of confessing. (People v. Hester, 39 Ill. 2d 489, 237 N.E. 2d 466.) The State, however, need only prove the voluntary nature of the confession by a preponderance of the evidence. When the testimony on this issue is conflicting, the decision of the trial court will not be disturbed on appeal. (People v. Myers, 35 Ill. 2d 311, 220 N.E. 2d 297). As a matter of fact, even if the trial court had chosen to believe the defendant's testimony it was not sufficient to show that his confession was involuntary. He was only incarcerated for eight hours prior to his confession and the alleged police conduct, which he maintains had overborne his will was simply, at the most, annoying. The determination of the trial court that the confession was voluntary could not be deemed to be manifestly against the weight of the evidence. (People v. Jackson, 41 Ill. 2d 102, 242 N.E. 2d 160).

The State's evidence established that defendant, without authority entered the building of Keck Electric Corporation with intent to commit a theft and that he and a confederate in fact removed certain tools from the building and later sold the tools to a third party. Defendant presented no evidence. The State's case was proven by uncontradicted testimony of the accomplice in the burglary. The testimony presented was completely consistent with defendant's own confession.

After the jury had begun its deliberations, it requested in writing that a transcript of the testimony of the accomplice witness be read to them. The

trial judge denied the request, and declared that he did so through exercise of his discretion and stated his reasons. It is within the trial court's discretion to allow or refuse a jury's request for a review of testimony. (People v. Pierce, 56 Ill. 2d 361, 308 N.E. 2d 577). Even if the trial court abused its discretion, harmless error would result since the jury subsequently reached the only possible verdict in view of the overwhelming evidence of guilt. (People v. Stahl, 26 Ill. 2d 403, 186 N.E. 349).

The trial court also explained, that in light of the past record of defendant, which included a conviction on twelve counts of burglary, for which he was on parole at the time of the offense involved in the instant case, the judge was acting for the protection of the public in setting the minimum sentence for six years. Under such circumstances it cannot be successfully contended that the sentence was either excessive or constituted an abuse of the trial court's discretion. (People v. Hayes, 52 Ill. 2d 170, 287 N.E. 2d 468).

On the basis of the record in this cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Will County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant Floyd DeBenedetti is allowed.

Judgment Affirmed and Withdrawal
Motion Allowed.

3D
21 I.A. 379

73-29

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice

Honorable GLENN K. SEIDENFELD, Justice

Honorable L. L. RECHENMACHER, Justice

LOREN J. STROTZ , Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
August 8, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
AUG 8 - 1974
LOREN J. SEROTZ, Clerk and Term
Appellate Court, Second District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	Winnebago County,
	)	Illinois.
EARL EUGENE DYE,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Charged by indictment with aggravated incest and indecent liberties with a child, defendant entered a negotiated plea of guilty to the charge of aggravated incest and, on November 15, 1972, was sentenced to a term of 2 to 6 years in the State Penitentiary. The charge of indecent liberties was dismissed. After a hearing on defendant's petition, probation was denied. Hearing in aggravation and mitigation was waived.

On appeal defendant claims that he was not admonished as to the nature of the charge in accordance with the requirements of Supreme Court Rule 402(a), that the trial court failed to determine the voluntariness of his plea (Rule 402(b)), and that the sentence imposed was excessive.

The record indicates that during the proceedings, the Assistant State's Attorney narrated the facts of the occasion which led to defendant's being charged with aggravated incest and therein specifically stated when and where the acts had been committed and what acts defendant had committed upon the person of his natural daughter. In response to the trial court's question, he described defendant's deviate sexual conduct. Thus, clearly set forth within the narrative were all points related to the nature of the offense with which defendant was charged (Ill. Rev. Stat. 1971, ch. 38, §11-10). There was no mere reading of the indictment. The description afforded was not couched in legal or technical language. A separate recitation of the nature of the charge would have been, in this instance and for this particular crime, merely repetitive. The record clearly indicates that defendant was unambiguously apprised of the nature of the offense with which he was charged. Additionally, defendant indicated his understanding after the trial judge advised him of the penalty which could be imposed for such offense and cautioned him that by his plea he waived the right to a jury trial and the right to confront witnesses. The requirements of Supreme Court Rule 402(a) were met.

Defendant asserts that it was not established that his plea was voluntarily made in accordance with Rule 402(b). (Ill. Rev. Stat. 1971, ch. 110A, §402(b).) Immediately following entry of the plea of guilty, defendant's counsel stated:

"I may state that the only promise that has been made to Mr. Dye or to myself prior to making this plea is that Count II of the Indictment will be dismissed."

After being fully admonished, defendant answered affirmatively to the court's question, "You understand fully what it means to plead guilty?" Defendant cites the following colloquy as indicia that the guilty plea "might not [have been] a voluntary one":

"The Court: Knowing that, you plead guilty, and
 you plead guilty because you are
 guilty?

The Defendant: I guess so.

The Court: Well, I mean for sure, is that correct?

The Defendant: That's what they said."

While most pleas of guilty consist of:

"***both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." North Carolina v. Alford, 400 U.S. 25, 37 (1970), 91 S. Ct. 160, 27 L. Ed. 2d 162, 171; People v. Grant, 1 Ill. App. 3d 658, 661 (1971).

"The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31; People v. Grant, 1 Ill. App. 3d 658, 661.

"In order to determine whether a defendant had the requisite depth of knowledge to have understandingly and voluntarily entered a plea of guilty, courts of review will look to the entire record in a practical and realistic manner." People v. Williams, 133 Ill. App. 2d 214, 216 (1971).

Our review of the proceedings indicates that defendant knowingly and voluntarily entered his plea of guilty and the conditions of Rule 402(b) were substantially met.

Arguing that his sentence should be reduced, defendant relies primarily upon a statement by the court:

" Under the new sentencing, it will come into effect January 1st, that is the guideline that will carry us. It will be the sentence of this Court that the Defendant be confined to the Illinois State Penitentiary at Joliet, Illinois for a period of not less than two or more than six years. In the new Act, it recommends three times the minimum. "

At the time of sentencing the penalty for aggravated incest was 2 to 20 years (Ill. Rev. Stat. 1971, ch. 38, §11-10). After January 1, 1973, this offense was designated as a Class 2 felony and, under the appropriate section of the new Correction Code (Ill. Rev. Stat. 1973, ch. 38, §1005-8-1(b) (3)) the penalty was set at 1 to 20 years.

Defendant contends that the quoted comment indicates the trial judge's intent to impose the minimum sentence allowable. In light of a total review of the record, we do not agree with that reading and find that the trial judge referred to the new Code for the purpose of establishing the maximum sentence in accordance with the "3 times the minimum" provision. During the hearing on probation, defendant admitted to a prior sentence in Vandalia (for non-support) and to a term in the State Penitentiary (for violating probation after a forgery conviction). He also admitted having committed a second forgery while on another probation and to the fact that he had twice been arrested for disorderly conduct. While defendant, an avowed alcoholic, blamed all occurrences (including that which led to the instant charge) on his drinking, he had never sought help for that problem. On the basis of defendant's past record, the sentence of the trial court was not unreasonable.

Judgment affirmed.

SEIDENFELD, RECHENMACHER, J.J. - concur

21 I.A.^{3D} 422

73-55

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
August 19, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
AUG 14 1974

LOREN J. SINGEL, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court of the 19th
DAVID JAMISON, a/k/a DWIGHT HAYDEN) Judicial Circuit,
and DESMEL WHITE, a/k/a HERKIE LEE) Lake County, Illinois.
ROBINSON,)
)
Defendants-Appellans.)

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Following a jury trial defendants were convicted of burglary. Jamison was sentenced to a term of 5 to 15 years and White to a term of 18 months to 5 years.

The first issue presented by the defendants on this appeal is whether their in-court identification was based upon a pre-trial show-up which was so unnecessarily suggestive as to deny defendants a fair trial.

On March 28, 1972 at about 10:45 a.m. Mrs. Engle after returning home telephoned the police to report that her home in Highland Park had been burglarized. She described to the police the two men she had seen coming out of her home, the yellow Hertz rental truck they got into, and the direction in which they were heading. Ten or fifteen minutes later, within a short distance of Mrs. Engle's home, the police apprehended the defendants in a yellow Hertz rental truck. The police returned with the defendants and the truck to the Engle residence

where she identified the defendants as the men she saw running out of her home. The defendants were then frisked and handcuffed.

Defendants argue that this identification was so unduly suggestive as to taint her in-court identification of the defendants. While "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as a part of a lineup, has been widely condemned, * * * a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it * * *." Stovall v. Denno (1967), 388 U.S. 293, 302, 18 L. Ed. 2d 1199,^{1206,} 87 S. Ct. 1967.

Moreover, on-the-scene identifications have never been condemned by the courts. (People v. Bazzelle (1970), 130 Ill. App. 2d 131, 137.) In People v. Drayton (1972), 7 Ill. App. 3d 812, 819, in referring to an on-the-scene confrontation such as that in the instant case the court said:

"The immediate on-the-scene confrontation was proper police investigative conduct made while the victim's memory of her attacker was fresh. [citation] It enabled the police to determine whether defendant was the assailant and also afforded defendant the opportunity to be freed if he were not identified."

See People v. Moore (1968), 104 Ill. App. 2d 343, 354.

In People v. Young (1970), 46 Ill. 2d 82, 87, the Illinois Supreme Court in referring to a similar situation said:

"Indeed, in our opinion, police officers who failed, in circumstances like these, to determine at once whether or not the victim of the crime could identify the men in custody as the men who committed the crime, would be subject to criticism."

See also People v. McMath (1970), 45 Ill. 2d 33, 36; People v. Fox (1971), 48 Ill. 2d 239, 248.



Defendants next contend that the trial court erred in denying their motion to suppress physical evidence in their possession when the police inventoried the items at the police station following their arrest. After Mrs. Engle made her on-the-scene identification of the defendants, they were taken to the police station and at police request emptied their pockets. Jamison turned over some currency and coins, and two Mexican peso notes. White turned over some coins and a key. Mr. Engle identified the key as his and testified that 2 five peso notes (no longer in use in Mexico) which he had acquired several years ago were missing from the dresser and he identified them as his own. A police officer testified that Mr. Engle came to the station twelve days after the burglary, looked at the property in the inventory envelopes of items taken from the defendants and identified the key and the five peso notes and that ^{it} was then that the coins, key and the Mexican notes were mentioned in a supplemental police report. The discovery and admission in evidence against the defendants of personal property, namely the key and the Mexican peso notes emptied from the defendants' pockets during the course of a normal police inventory were proper. People v. Hambrick (1968), 98 Ill. App. 2d 481, 483; see also United States v. Vallejo (3d Cir. 1973), 482 F. 2d 616, 622.

The defendants here were proven guilty beyond a reasonable doubt. Mrs. Engle positively identified both defendants as the men who ran from her home to the Hertz rental truck. This testimony and the arrest of both defendants shortly after the commission of the offense and the discovery in their possession of items taken from the Engle home amply



establish that they were guilty of the crime of burglary. The testimony of a single witness, if it is positive and the witness is credible is sufficient to convict even though it is contradicted by the accused. People v. Wilbert (1973), 15 Ill. App. 3d 974, 981; People v. Guido (1962), 25 Ill. 2d 204, 208-209.

Finally, defendant Jamison contends that there was an arbitrary denial of his application for treatment as a narcotics addict under Section 120.1/^{et}seq. of the Dangerous Drug Abuse Act (Ill. Rev. Stat. 1971, ch. 91 1/2, par. 120.1 et seq.). He urges remandment for the purpose of determining whether the rejection of his admission into the program was proper, and if so, to reduce his sentence. Section 120.9 of that act includes this provision:

"No individual may be placed under the supervision of the Department [of Mental Health] for treatment under this section unless the Department accepts him for treatment."

Here, the Department wrote a letter to the trial judge stating that Jamison was unacceptable for treatment under Sections 120.9 and 120.10 of the Drug Abuse Act.

Jamison had admitted to the probation officer preparing the pre-sentence report that he was not interested in rehabilitation from drug abuse. There is nothing in this record to indicate that defendant attempted to go off drugs during the six years preceding the trial. Indeed, at the probation hearing his counsel stated in referring to Jamison's drug problem, "He's not an addict at this point obviously. He's been in Lake County in jail for five or six months." Since Jamison's addiction was broken while he was in jail the trial



court's action in denying probation or treatment as a drug addict was proper/especially in view of Jamison's criminal record. And we are unable to say that his sentence was excessive.

People v. Clinkscale (1973), 14 Ill. App.3d 226, cited by defendant Jamison is inapposite. In that case the Mental Health Department not only found the defendant acceptable for treatment but stated in writing that they had accepted him for treatment in the Drug Abuse Program. It was for that reason that the trial court's order in that case denying defendant's petition to entrance to the Drug Abuse Program was reversed and remanded for further consideration. In the instant case Jamison was never accepted.

Therefore the judgment of the Circuit Court of Lake County is affirmed.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.



21 I.A. 476^{3P}

73-78

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
August 19, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:



~~Abstract~~

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

AUG 19 1974

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

THE PEOPLE OF THE STATE OF)
ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the
) Circuit Court of
WILLIE SID DuPREE,) the 17th Judicial
) Circuit, Winnebago
Defendant-Appellant.) County, Illinois.

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was charged with rape, deviate sexual assault and aggravated battery. He was found guilty by the jury only of the offense of aggravated battery, for which he was sentenced to serve not less than two nor more than ten years in the penitentiary.

In this appeal defendant contends: (1) that he was not proven guilty of aggravated battery beyond a reasonable doubt; (2) that the verdict was so inconsistent with the jury's inability to reach a verdict on the sex charges that a mistrial should be declared; (3) that the defendant was so prejudiced by a remark made by the complaining witness that his motion for a mistrial should have been granted; (4) that the conduct of the prosecutor was improper and that his sentence was unduly severe.

The defendant, had for several years, been intimate with the complaining witness, however he had broken off with her sometime previous to the incident which occasioned this conviction. The evidence is conflicting as to when he had



last been intimate with her previous to the incident in question but it was probably at least several months before the occurrence.

The complaining witness was about 35 to 38 years old, the defendant about 28 or 29. The complaining witness's reputation for either veracity or sobriety was not good. On the other hand the defendant had been convicted of at least two felonies and several misdemeanors during a period of 10 to 12 years, although there were no convictions for any serious crimes for the past three or four years preceding the present incident.

The defendant ^{testified} ~~stated~~ he went to a tavern late in the evening. He saw the complainant there and she made advances to him, reproaching him for having left her for another woman. They agreed to drive to some place where they could have sexual intercourse, whereupon they left the tavern and he drove her to a lonely spot where this occurred. Afterwards she became angry when the defendant would not agree to continue the old relationship and tried to stab him with a knife she found in his car, whereupon he slapped her several times, put her in the car and drove her to a friendly neighbor where he left her.

The complainant tells a very different story. She says that she went to the tavern, not knowing the defendant would be there, that as soon as she entered the tavern she saw defendant, who began calling to her and making remarks to her. She remained standing by the door of the tavern and as she was standing there the defendant came up to her, grabbed her by the arm, pulled her out of the tavern, across the parking lot, pushed her into his car, struck her and then drove her to a lonely spot on the highway several miles away, where he



raped her, beat her and forced her to perform deviate sexual acts. She testified that she resisted him but he kept beating her, threatened to kill her and forced her to perform deviate sexual acts after he raped her. Afterwards he drove her to the home of one Flowers, a neighbor, where he left her. She asked Flowers to take her to the South Beloit Police Station where she reported that she had been raped and beaten by the defendant.

There were many conflicts in the testimony at the trial. Photographs were introduced which showed bruise marks on both the complainants's checks and scratches on her legs. The defendant admitted slapping the complainant when she became hysterical following his rejection of her wish to resume their former relationship, but denied any other acts of violence. Complainant denied she asked the defendant to resume their relationship. She testified she had not had sexual relations with the defendant during the last three years. There was some testimony at the trial indicating more recent intimacies, possibly within a year and a half. Defendant's contention that he was not proved guilty of aggravated battery beyond a reasonable doubt presents a close question, since the evidence is conflicting. There can be no doubt, however, that defendant inflicted considerable physical injury on the complainant. The neighbor, Flowers, who took her to the police station at her request, testified as to her bleeding and disheveled condition and that she was crying and emotionally upset when he first saw her. Her daughter testified she saw her the next day and complainant had bruises on her face, she walked with a limp and



her leg was scarred up. There was also evidence that she was bleeding from the rectum when she was at the police station, as was testified to by Flowers.

As Justice Moran, speaking for this court, said in the case of People v. Newton (1972), 7 Ill. App. 3d 445, 447:

"The general rule is that it is a question for the trier of fact whether the injury inflicted during a battery is of the nature to constitute great bodily harm or permanent disfigurement under the statute for aggravated battery. (People v. Barbour (1972), 5 Ill. App.3d 323, 325-326; People v. Allen (1969), 117 Ill. App. 2d 20, 28; People v. Harper (1968), 91 Ill. App. 2d 179, 185; People v. Cavanaugh (1957), 18 Ill. App. 2d 279, 288-289, aff'd (1958), 13 Ill. 2d 491.)"

In the case before us we cannot say as a matter of law that the verdict of guilty on the count of aggravated battery was palpably wrong and contrary to the manifest weight of the evidence. The degree of the injury was a matter of fact to be found by the jury. The actual extent to which the complainant was beaten had to be determined by the jury from the conflicting stories told by the witnesses and the jury's judgment of the credibility of the witnesses is of decisive importance in making this determination. In this case we do not feel there would be any legal justification for ignoring the jury's finding. Even though the evidence of "great bodily harm" as set out in the statute, is not clear and compelling it is sufficient to sustain the verdict on appeal.

The defendant also argues that the verdict of guilty on the aggravated battery charge, while at the same time the jury was, in effect, rejecting the sex charge--on which no verdict was agreed to--is such an inconsistency



as to merit a new trial.

Defendant invokes the case of People v. Weaver (1968), 93 Ill. App. 2d 311, in which it was held that where a single course of conduct was the basis for both a charge of rape and aggravated battery the imposition of separate sentences for the two crimes was improper and the conviction for the lesser charge of aggravated battery should be reversed. The abstract decision of People v. Gersbacher (1968), 102 Ill. App. 2d 165, is also cited by the defendant, however it seems clear that the question in both these cases arose out of separate sentences for the same conduct, which is not the question here. In the case before us there was only one conviction and one sentence and the fact that the jury did not reach an agreement on the rape charge does not affect a conviction on the lesser charge of aggravated battery. People v. Moore (1972), 51 Ill. 2d 79; People v. Harper (1972), 50 Ill. 2d 296; People v. Smith (1972), 6 Ill. App. 3d 259; People v. Weaver, supra.

A third ground for reversal urged by the defendant is based on a volunteered statement by the complaining witness, which it is claimed, prejudiced the defendant in the minds of the jury. Upon cross-examination the complainant was asked when she first started going with the defendant. She replied she did not know what year it was. In response to a follow-up question, "You don't know when you started going with him?", she answered, "It has been several years ago, before he was put in prison, a long time ago." Defense counsel immediately objected, the jury was removed from the court room and the defense counsel moved for a mistrial.



The court overruled the motion and when the witness returned to the stand he admonished her to be responsive to the question and not to add anything to her answer but just answer the question.

Defendant contends that in view of the closeness of the factual issues as indicated by the jury's failure to agree on the rape and deviate sexual charges, the prejudice generated by the complainant's volunteered, unresponsive answer indicating defendant had once been in prison, may have been the deciding factor in the jury's finding against him on the aggravated battery charge.

Had the State been responsible for the prejudicial remark made by the complainant it might have been grounds for a mistrial and the trial court might have been in error in overruling the objection of defense counsel, but the response here, while unresponsive to the question, was clearly induced by defense counsel's persistence in trying to pin down the date when complainant first started going with defendant. Defense counsel certainly knew of defendant's previous incarceration and knew or should have known he was treading on dangerous grounds in fixing a certain period of time in the defendant's past. A long line of Illinois cases has held that the State is not responsible for prejudicial testimony elicited by the defense on cross-examination. (People v. Garafola, (1938), 369 Ill. 232, 238; People v. Borage (1961), 23 Ill. 2d 280; People v. Bell (1972), 53 Ill. 2d 122; People v. Jones (1973); 12 Ill. App. 3d 643.) In People v. Borage, supra, the Illinois Supreme Court said, p. 283: "If a defendant procures, invites or acquiesces in the admission of evidence, even though it be improper, he cannot complain." Under the circumstances here we do not feel the unresponsive answer complained of is sufficient grounds for reversing the trial court and granting a



new trial.

The defendant also contends that the conduct of the prosecutor throughout the trial and in closing argument was prejudicial to the defendant. While the record indicates some questionable behavior on the part of the prosecutor it was certainly not sufficiently flagrant or prejudicial to justify reversing the defendant's conviction.

Finally, the defendant contends the sentence of not less than two nor more than ten years in the penitentiary is excessive in view of the conflicting testimony and the failure of the jury to convict on the sex charges. The court had a possible alternative--a sentence of one year in an institution other than the penitentiary--and had it not been for the defendant's record of several convictions we agree that it might well have been an abuse of discretion to sentence defendant to the harsher term, considering all the circumstances. However, the defendant had a record of several convictions both for felonies and misdemeanors and we cannot say the court abused its discretion in imposing the penitentiary sentence in question.

We find no error in the record requiring reversal and the judgment of the trial court is affirmed.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.



121 I.A. 477^{3D}

72-204

UNITED STATES OF AMERICA

ate of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
Elgin, on the 3rd day of December, in the year of our
rd one thousand nine hundred and seventy-three, within and
r the Second District of Illinois:

esent -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
AUG 19 1974 the Opinion of the Court was filed in
e Clerk's office of said Court, in the words and figures
llowing, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
AUG 19 1974
LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the 18th
	)	Judicial Circuit
v.	)	Du Page County,
	)	Illinois
ANTHONY R. ROSOCHACKI,)	
)	
Defendant-Appellant.)	

MR. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

Defendant, Anthony R. Rosochacki, was charged in a criminal complaint with theft based upon receiving stolen property in violation of Section 16-1 (d) (1) of the Illinois Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 16-1 (d) (1).) Upon completion of a bench trial in the Circuit Court of Du Page County, defendant was found guilty of this offense and was sentenced to serve 90 days in the county jail.

The single issue presented for our consideration is whether or not defendant was proven guilty of this offense beyond a reasonable doubt.

In its case in chief the State elicited testimony from two witnesses. Donald Thompson, the owner of the 1962 Chevrolet which had been stolen, testified in essence that he owned the automobile and that it was stolen from its parking place in front of Thompson's residence on February 11, 1972. Upon discovering the unexplained absence of his Chevrolet, Thompson stated that he reported the vehicle as stolen.

Next, John Ylisela, a police officer for the village of Bloomingdale, testified that on February 27, 1972 he stopped the stolen 1962 Chevrolet as it was proceeding easterly along Lake Street in Du Page County. The officer stated that the defendant was in possession of, and driving, the vehicle.



The officer further stated that this stop was made pursuant to a radio communication. He told the defendant that it would be necessary for him to come to the Bloomingdale police department. At the police station the officer told defendant that he was driving a stolen automobile. Defendant responded that it was his car; however, defendant was unable to produce any proof of ownership upon request.

Defendant testified in his own behalf. He stated that he had received the car from one John Carl for \$40.00. He further stated that Carl was awaiting title for the vehicle from Springfield; and upon receiving the title, it was agreed that defendant would pay the balance of the purchase price to Carl. Since the trial judge found defendant guilty, he obviously was unconvinced by defendant's testimony.

That portion of the theft statute defendant was charged with having violated, reads in pertinent part:

"A person commits theft when he knowingly . . .
(d) Obtains control of stolen property . . .
under such circumstances as would reasonably
induce him to believe that the property was
stolen, and (1) Intends to deprive the owner
permanently of the use or benefit of the property
. . ." Ill. Rev. Stat. 1969, Ch. 38, par. 16-1.

This portion of the theft statute was included in the Criminal Code in 1967 to serve as an additional means of covering the specific situation of receiving stolen property. S.H.A. Stat. Ch. 38, Sec. 16-1 Committee Comments and Historical Note; see also People v. Mc Cormick (1968), 92 Ill.App.2d 6, 235 N.E.2d 832.

In order to sustain a conviction for theft based upon receipt of stolen property, the prosecution must prove four elements of the crime. First, that the property has, in fact, been stolen by a person other than the one charged with receiving it. Second, that the one charged with receiving it has actually received the property stolen, or aided in concealing it. Third, that the receiver knew that the property was stolen at the time he received it. Fourth, that the one charged with the crime received the property for his own gain or to prevent the owner from again





57238

3D
21 I.A. 577

RENFIELD IMPORTERS, LTD., a)	
New York corporation,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
)	
	)	Court of Cook County.
v.)	
)	
FOREMOST SALES PROMOTIONS, INC.,	)	Daniel A. Covelli, J.
an Illinois corporation,)	
)	
Defendant-Appellant.)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

This is an action under the Fair Trade Act (Ill.Rev.Stat., 1971, ch. 121-1/2, paras. 188-191) to enforce contracts for the sale of an alcoholic beverage at a stipulated price.

Renfield Importers, Ltd., is a distributor of alcoholic liquors. Foremost Sales Promotions, Inc., franchises the name "Foremost Liquors" or "Foremost Liquor Store" to retail stores. Renfield entered into fair trade agreements with retailers who were franchisees of the defendant. Under the agreements the retailers agreed not to sell or advertise the plaintiff's products below stipulated prices.

In October 1971 Foremost advertised in a Chicago newspaper that a "large bottle" of Martini & Rossi vermouth (distributed by Renfield) could be bought at 27 Foremost liquor stores for \$1.89. It was alleged in Renfield's complaint that this was below the stipulated

price of \$2.49. Renfield brought separate actions against the defendant and against the franchisees listed in the advertisement. In both actions it sought injunctions to enjoin further violations of the fair trade agreements. A temporary injunction was entered which was later dissolved and Foremost filed a suggestion of damages pursuant to Ill.Rev.Stat., 1971, ch. 69, para. 12, for its costs in procuring the dissolution. Renfield's motion for an oral discovery deposition of Foremost's attorney with regard to the suggestion of damages was granted.

On the first day of the trial Foremost withdrew the answer and a counterclaim which it had filed and substituted a motion to dismiss. Prior to arguing the motion, Foremost suggested that the parties agree to three stipulations: first, that Foremost was the agent of the retailers listed in the advertisement; second, that Foremost was the agent for all the defendant-retailers in the action brought against them by the plaintiff and, third, that the advertisement was published by Foremost for the benefit of those defendants. Counsel for Renfield agreed to the stipulations and they were entered into the record.

Foremost then argued its motion to dismiss and contended that it could not be liable for the violations alleged in the complaint, because it had acted as an agent. The motion was denied. Foremost stood on its motion and a permanent injunction was entered against it.

On appeal, Foremost repeats the argument it made to the trial court that as an agent it was not liable for the violations of the

Fair Trade Act alleged in the complaint; it also asserts that the complaint was insufficient because it did not state a violation of the Act and was deficient in that it was not properly verified. It further contends that Renfield's allegation of fair and open competition was not well-pleaded and was therefore not admitted by the motion to dismiss and that, regardless of the motion, it was Renfield's burden to prove this allegation at an evidentiary hearing. Additional contentions are that the permanent injunction was invalid because it lacked specificity and that the order allowing the deposition of its counsel was improper.

This court is not bound by the stipulation of the parties that the defendant was the agent of the retailers named in the advertisement because the stipulation was on a question of law. People v. Levisen (1950), 404 Ill. 574, 90 N.E.2d 213; National Bank of Colchester v. Murphy (1943), 384 Ill. 61, 50 N.E.2d 748. Whether or not the legal relationship between the defendant and the retailers constituted agency is for a court to decide. Because we do not accept the parties' stipulation and because we cannot determine agency due to lack of information on which to base our conclusion, we need not decide what the status of an agent would be under the Fair Trade Act. However, the same issue was raised by the same defendant in the case of Taylor Wine Co., Inc., v. Foremost Sales Promotions, Inc., (1973), 12 Ill.App.3d 1042, 299 N.E.2d 556. In Taylor the court held that if the defendant were an agent it

would still be enjoined through its principal named in the injunction and that the issue, therefore, did not have to be considered.

The defendant's assertion of error that the complaint was improperly verified is raised for the first time in this court. When alleged deficiencies in a complaint are first raised on appeal, they will only be considered if the complaint wholly fails to state a cause of action; they will not be considered if the allegations in the complaint are merely defective or imperfectly set forth. Lion Specialty & Properties, Inc., v. City of Chicago Zoning Bd. of Appeals (1969), 107 Ill.App.2d 354, 247 N.E.2d 30. By not raising the alleged deficiency of the verification in the trial court, the defendant waived any error.

It is asserted that the complaint did not state a violation of the Fair Trade Act because the sheet of stipulated prices did not list a "large bottle" of Martini & Rossi vermouth, and therefore the stipulated price for that size bottle would have to be proven at an evidentiary hearing. The complaint charged that, "...defendant again violated said Fair Trade Agreements by advertising in the Chicago Tribune on Thursday, October 14, 1971, Martini & Rossi Vermouth 'large bottle' for \$1.89 when the stipulated fair trade price for said item was \$2.49." This was a well-pleaded factual allegation and a motion to dismiss admits well-pleaded facts. Logan v. Presbyterian-St.Luke's Hospital (1968), 92 Ill.App.2d 68, 235 N.E.2d 851.

It is essential in a fair-trade case that a plaintiff allege and prove that its product is in open and fair competition with like products. Sunbeam Corp. v. Central Housekeeping Mart, Inc., (1954), 2 Ill.App.2d 543, 120 N.E.2d 362. The complaint alleged that each Renfield product "is and has been in fair and open competition, in the City of Chicago and elsewhere in the State of Illinois, with products and commodities of the same general class produced and distributed by others." It is contended that this allegation was nothing more than a legal conclusion and therefore the complaint did not state a cause of action under the Fair Trade Act and should have been dismissed. The plaintiff counters that the allegation was a well-pleaded, ultimate fact which was admitted by the motion to dismiss.

The line between "ultimate" facts and "conclusions of law" is not easily drawn. VanDeKerkhov v. City of Herrin (1972), 51 Ill.2d 374, 282 N.E.2d 723. An ultimate fact states the fact on which the legal conclusion is based. Only the ultimate facts to be proved need be alleged and not the evidentiary facts tending to prove such ultimate facts. Board of Education v. Kankakee Federation of Teachers, Local No. 886 (1970), 46 Ill.2d 439, 264 N.E.2d 18, cert.denied, 403 U.S. 904 (1971). The complaint alleged that Renfield's products were in fair and open competition. It would be difficult to expatiate on this allegation without going into detail. Pleading more than the ultimate fact, for example the names of competing brands and their prices, would be pleading evidence. Evidence should not be pleaded; ultimate facts may be,

notwithstanding that to an extent they may represent conclusions drawn from intermediate evidentiary facts. O'Brien v. Matual (1957), 14 Ill.App.2d 173, 144 N.E.2d 446. Renfield's fair and open competition allegation was well-pleaded and Foreman's motion to dismiss admitted the truth of the allegation.

However, Foremost argues that, despite its motion to dismiss, it was Renfield's obligation — because fair-trade statutes are in derogation of free enterprise — to prove the fair and open competition allegation at an evidentiary hearing before an injunction could issue. The defendant does not cite any Illinois cases in point. Three Pennsylvania cases are cited which held respectively that an admission by the defendant in its answer that the plaintiff's product was in fair and open competition without further evidence of the fact was insufficient to justify a permanent injunction (Gulf Oil Corporation v. Mays (1960), 401 Pa. 413, 164 A.2d 656), parties could not agree to the issuance of an injunction without an adjudication of the fair and open competition issue (Mead Johnson & Co. v. Breggar (1963), 410 Pa. 408, 189 A.2d 866), and a stipulation could not substitute for proof of fair and open competition (Gillette Co. v. Master (1962), 408 Pa. 202, 182 A.2d 734). The Pennsylvania cases illustrate a deep concern that Fair Trade Acts are to be enforced only when fair-trade products are actually competing in the open market. We share that concern but do not find it jeopardized

by holding that a motion to dismiss admits a well-pleaded allegation. This holding by no means detracts from the Illinois cases which stress the importance of fair and open competition under the Illinois Fair Trade Act and the necessity for adequate proof of such competition at trial.

It is further contended that the permanent injunction is invalid because it refers to another document in contravention of Ill.Rev.Stat., 1971, ch. 69, para. 3-1, which states: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained;..." The reference to the stipulated price sheet in the injunction does not render the injunction invalid. It utilizes the only practical way of referring to the current stipulated prices. Referring to the price sheets is neither burdensome nor confusing because the sheets are accessible and readily available to the defendant. The injunction clearly informs Foremost of what it is restrained from doing and is therefore sufficiently specific. The specificity of injunctions which refer to stipulated price sheets has been considered in several cases and the same conclusion has been reached. Accord: Taylor Wine Co., Inc., v. Foremost Sales Promotions, Inc.; Calvert Distillers Co. v. Vesolowski (1973),

14 Ill.App.3d 634, 303 N.E.2d 170; The Paddington Corp. v. Westville Beverage Mart, Inc., (1973), 12 Ill.App.3d 555, 299 N.E.2d 554.

Finally, Foremost contends that discovery cannot be allowed with regard to its suggestion of damages following the dissolution of the temporary injunction. According to Ill.Rev.Stat., 1971, ch. 69, para. 12, "...the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require...." The statutes (Ill.Rev.Stat., 1971, ch. 110A, paras. 201 to 219) and the relevant case law do not preclude the use of discovery as to a suggestion of damages nor, contrary to the defendant's contention, does the fact that a suggestion of damages may be a summary proceeding and remedial in nature. The defendant put a question of damages in issue and its adversary was entitled to be fully informed of the facts prior to the trial of this issue. The trial court, therefore, did not err in granting the plaintiff's motion for discovery.

The orders entered by the trial court are affirmed.

Affirmed.

McNamara, P.J., and Mejda, J., concur.

In the mid-afternoon of August 5, 1968, the plaintiffs had finished shopping at a grocery store located along North Broadway Avenue in Chicago and were walking across the parking lot of that establishment when they were struck and knocked down by an automobile operated by the defendant which had just pulled out of a parking space in the lot. Plaintiffs were taken by ambulance to Illinois Masonic Hospital, where they underwent emergency treatment and X-rays until their discharge that evening. Plaintiffs consulted Dr. Joseph Kahn the day following the mishap and remained in his care for about a month, the elder plaintiff, aged 45 years, for pains in the lower right back and the younger plaintiff, aged 14, for pains in the arms, knees and neck. Dr. Kahn found the elder plaintiff to have been suffering from a contusion of the right flank and a strain of the right lumbar paraspinal muscles, for which he prescribed a course of diathermy treatments

and medication; his prognosis for that plaintiff was that she should make a complete recovery, although there might be some recurrence of the symptoms upon a relatively minor trauma to the back in the future; he last saw that plaintiff on September 5, 1968, at which time she had not completely recovered from her injuries and he had not completed his course of treatment.

Dr. Kahn diagnosed the condition of the younger plaintiff as an abrasion to the left shoulder, a laceration and contusion of the left elbow, contusions of both knees and a contusion of the right iliac crest, for which he prescribed diathermy and rest. His prognosis for this plaintiff was complete recovery, with a permanent scar at the left elbow and a possibility of early development of arthritis in the knees. He last saw this plaintiff on September 5, 1968, and recalled nothing specific concerning her state of recovery at that time.

The plaintiffs next consulted Dr. Joseph Zoltan for their respective injuries, in the early part of September, 1968. The doctor found limited movement and lack of tendon reflexes in the leg of the elder plaintiff, as well as a lack of sensation in the inner calf area which indicated nerve root involvement at the base of the spine. When the elder plaintiff failed to respond to treatment, she was placed in traction in the Illinois Masonic Hospital for a period of one week in April, 1969, after which her condition improved although she was still in some pain. The elder plaintiff's condition was diagnosed by Dr. Zoltan as "reticulitis, sciatic nerve" and the prognosis was "guarded, condition likely to be permanent."

Dr. Zoltan diagnosed the condition of the younger plaintiff as a laceration of the elbow, which had been sutured and treated, and multiple abrasions, contusions and sprains of the neck, head and lower extremity; his prognosis was "very good." He treated the younger plaintiff over a period of four or five months, subjecting her to muscle relaxants and physiotherapy.

Dr. Zoltan was questioned extensively on cross-examination relative to his methods of record keeping and his method of keeping records in the instant case; the reports which he had submitted to the defendant did not show the complete dates of consultations with these plaintiffs, but were the complete records in his possession as to those patients. An objection raised by defendant during the redirect examination of the doctor, which was the same objection raised during plaintiffs' opening statement to the jury and which was then overruled, related to testimony by the doctor concerning his treatment of the plaintiffs and concerning the hospitalization in April, 1969, of the elder plaintiff, on the ground that such matters were not contained in the plaintiffs' answers to the defendant's interrogatories which were submitted to plaintiffs after those treatments and that hospitalization had occurred. That objection was overruled, and a motion relating to the same matter was later denied, after the court determined that defendant's initial counsel in this case had received copies of the questioned reports showing such matters, after it appeared that trial counsel had access to such information, and after it appeared on cross-examination of the doctor by the defense that defendant was not prejudiced by the introduction of that evidence, although defense counsel claimed to have been surprised thereby.

Defendant contends that the trial court should have denied admission into evidence of that part of Dr. Zoltan's testimony which related to portions of the treatments of the plaintiffs and the hospitalization of the elder plaintiff as a sanction for plaintiffs' alleged failure to note such information in their answers to defendant's interrogatories, according to Supreme Court Rule 219. (50 Ill. 2d, Rule 219.) Defendant argues that the withholding of such information precluded her from questioning the permanency of the injuries sustained by plaintiffs, and challenging the damages resulting therefrom, in light of the testimony of Dr. Kahn that plaintiffs had allegedly completely recovered from their injuries at the time they ceased seeing him.

The interrogatories submitted to plaintiffs by defendant requested all information relating to, inter alia, the treating and consulting physicians, hospitalizations, and the charges for same; the answers to those interrogatories related that plaintiffs had consulted Drs. Kahn and Zoltan, and further related that plaintiffs had been treated at the Illinois Masonic Hospital. The reports submitted by Dr. Zoltan and that submitted by Illinois Masonic Hospital fail to specifically disclose treatments of the plaintiffs beyond November, 1968.

The sanctions requested by defendant, as prescribed by Supreme Court Rule 219, are to be applied within the sound discretion of the trial court. (See, e.g., Kujala v. Jackson, 123 Ill. App. 2d 11, 15, 259 N.E. 2d 648.) A review of the circumstances with which the trial court was faced in the instant case, in determining whether to apply such sanction in striking the questioned testimony of Dr. Zoltan, indicates that the court did not abuse its discretion in permitting that evidence to go to the jury. It should also be noted that Dr. Kahn did not testify that the plaintiffs had fully recovered, as defendant now contends.

The reports in the possession of the defendant showed treatments of plaintiffs by Dr. Zoltan in September and November, 1968; the hospital reports depict X-rays taken of the elder plaintiff in April, 1969, with the referring doctor as Dr. Zoltan. It also appears of record, and is not denied by defendant, that copies of the appropriate reports had been forwarded to the defendant prior to the filing of the interrogatories, as evidenced by defendant's trial counsel's possession of one of those reports at trial and his further statement that he did not have to read those reports if he chose not to. Finally, although the answers to the interrogatories state that the plaintiffs had received a report from Dr. Zoltan, it does not appear that defendant requested a copy of that report nor does it appear that defendant took a deposition from Dr. Zoltan. The cases cited by defendant in support of her

position involve the imposition of sanctions for violation of the requirement that prospective witnesses be listed on the pretrial list of witnesses; the principles of law enunciated in those cases are admitted by plaintiffs but are not applicable under the circumstances involved here. See, e.g., Kujala v. Jackson, *supra*; Kirkwood v. Checker Taxi Co., 12 Ill. App. 3d 129, 298 N.E. 2d 233; Dempski v. Dempski, 27 Ill. 2d 69, 187 N.E. 2d 734.

Defendant further contends that the verdicts returned by the jury were excessive, but fails to state the reason why this is so. The verdicts are within the amounts demanded by plaintiffs in the ad damnum clause of the complaint; plaintiffs adduced substantial evidence of injuries and suffering, of both a temporary and permanent nature. The fixing of damages is primarily a function of the trier of fact, in the instant case the jury, and no claim is made that the amounts here arrived at were the result of passion or prejudice on their part. The verdicts are not excessive and will not be reduced. Goldstein v. Hertz Corporation, 16 Ill. App. 3d 89, 305 N.E. 2d 617.

Defendant also contends that the trial court improperly allowed plaintiffs' counsel to comment during final argument concerning the Chinese ancestry of the plaintiffs and to state that they should not be deprived of a fair trial on that account. No objection was raised by the defendant at the time this comment was made, and in fact defendant commented upon that question on two occasions during the subsequent argument to the jury. Defendant cannot now be heard to complain in this regard. Mulvey v. Illinois Bell Telephone Co., 5 Ill. App. 3d 1057, 284 N.E. 2d 356.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

* BURKE, J., did not participate.



3D
21 I.A. 705

59868

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Respondent-Appellee,)	
)	
v.)	
)	
ROGER PIERCE,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Petitioner-Appellant.)	)	PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Petitioner appeals from the dismissal of his petition for post-conviction relief contending that counsel on his direct appeal of a conviction for attempt (robbery) was incompetent in that he failed to raise an issue certain to prevail.

Petitioner was found guilty by a jury of attempt (robbery) and sentenced to a term of eight to ten years. The judgment of conviction was affirmed on November 30, 1972, in People v. Pierce, 53 Ill.2d 130, 290 N.E.2d 256; no petition for rehearing was filed in the Supreme Court to reconsider that decision.

On May 8, 1973, petitioner filed a pro se petition pursuant to the provisions of the Illinois Post-Conviction Hearing Act in which he questioned the legality of the minimum sentence imposed in light of the provisions of the Unified Code of Corrections. (Ill. Rev. Stat. 1973, ch. 38, pars. 122-1 et seq.; 18-1, 8-4, 1005-8-1(c).) Private counsel was appointed to represent petitioner in the post-conviction proceedings. An amended post-conviction petition was filed alleging (a) the incompetence of appointed counsel on the direct appeal in failing to file a petition for rehearing in the Supreme Court which allegedly would have extended the pendency of that action beyond January 1, 1973, on which date the Unified Code of Corrections had become effective, thereby entitling peti-

* Sullivan, P.J., Drucker, J., and Lorenz, J., participating.

tioner to the benefit of the ameliorated sentencing provisions of that Code (Ill. Rev. Stat. 1973, ch. 38, par. 1008-2-4; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269); and (b) that the Unified Code of Corrections created an unconstitutional classification by arbitrarily setting its effective date at January 1, 1973, for cases not then having reached "final adjudication," where the final adjudication in the direct appeal from the instant conviction pre-dated that date by but a few days. The People filed a motion to dismiss the amended petition on the ground that it raised no constitutional issues, and petitioner filed objections to that motion. The record also reflects that petitioner's appointed counsel in these proceedings interviewed petitioner both personally and by mail and considered the record compiled in the case in pursuing the ground advanced by petition for post-conviction relief.

At the hearing on the People's motion to dismiss arguments were raised concerning the failure of petitioner's counsel on the direct appeal to file a petition for rehearing in that matter in light of the allegedly crucial dates involved. Petitioner claimed that the filing of such petition for rehearing from the November 30, 1972, Supreme Court decision would have extended the pendency of that case beyond January 1, 1973. The trial court was of the opinion that the Supreme Court had in fact considered the provisions of the Unified Code of Corrections and that the Supreme Court, if it were so inclined, could have withheld its final determination in that matter for 30 or 60 additional days. Petitioner's counsel responded that if such were the circumstances, it would have unconstitutionally "singled out" petitioner. The motion of the People was sustained; the post-conviction petition was dismissed without an evidentiary hearing; and petitioner has appealed.

Opinion

The sole contention raised on this appeal is that appointed counsel on the direct appeal was incompetent in failing to raise the question of sentencing under the Unified Code of Corrections in a petition for rehearing from the Supreme Court's decision in that case, the filing of which petition for rehearing would have extended the pendency of that case, would have prevented its "final adjudication" prior to the effective date of the Unified Code of Corrections and would have afforded petitioner the benefit of the ameliorated sentencing provisions of the Code.

The Supreme Court's opinion in the direct appeal from petitioner's conviction was filed on November 30, 1972, which was 32 calendar days prior to the January 1, 1973, effective date of the Unified Code of Corrections. As petitioner noted below, and as he notes on this appeal, the direct appeal "reached final adjudication" 21 days after the filing of that decision, on December 21, 1972, the time within which the petition for rehearing could have been filed and on which date the mandate of the Supreme Court had issued. (50 Ill.2d, R. 367.) Counsel in the direct appeal raised two issues, one, the propriety of the complaining witness' identification of petitioner, and two, the alleged excessiveness of the minimum term imposed by the trial court "in light of [the Supreme Court's] statutory provisions regarding indeterminate sentences and parole." (Pierce, at 131.) The Supreme Court found the latter contention without merit in that petitioner had theretofore served a lengthy sentence for manslaughter, and the court found no reason to disturb the minimum term imposed.

Counsel on appeal is under no obligation to raise every conceivable issue as grounds for relief; it does not constitute incompetence of counsel to refrain from raising issues which in

his judgment are patently meritless. (People v. Frank, 48 Ill.2d 500, 272 N.E.2d 25.) Petitioner's contention presumes that his counsel on the direct appeal considered that the Supreme Court had overlooked the "meritorious issue" of the applicability of the sentencing provisions of the Unified Code of Corrections in deciding the case, and that the filing of a petition for rehearing raising that issue would have automatically extended the pendency of the appeal beyond the January 1, 1973, date. That contention was not so "patently meritorious" that failure of counsel to raise it in a petition for rehearing constituted incompetence on his part.

The decision in the direct appeal was filed on November 30, 1972, 32 days before the effective date of the Unified Code of Corrections. The 21 days allowed by Supreme Court Rule 367 for the filing of a petition for rehearing would not have automatically extended the pendency of the case beyond the January 1, 1973, date. The Supreme Court in the direct appeal considered and found wanting a contention raised concerning the minimum sentence imposed by the trial court. Such considerations afforded sufficient grounds for appellate counsel to have concluded that that issue was without merit.

In People v. Custer, 11 Ill. App.3d 249, 296 N.E.2d 753, cited by petitioner in support of the position that the filing of a petition for rehearing would have automatically extended the pendency of the action beyond the effective date of the Unified Code of Corrections, the reviewing court's opinion was filed on December 27, 1972, and therefore, under the provisions of Supreme Court Rule 367, the mandate of the reviewing court could not have issued until after the effective date of the Code, January 1, 1973. Here the mandate could have and did issue prior to the effective date of the Code.

Failure of counsel to have filed a petition for rehearing

from the Supreme Court's decision affirming the judgment of conviction on the direct appeal did not constitute incompetence. Since excessiveness of sentence, of itself, is not a ground cognizable in a post-conviction proceeding, petitioner has here advanced no ground upon which relief may be predicated. See People v. Null, 13 Ill. App.3d 60, 299 N.E.2d 792; People v. Frank.

The judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

Abstract only.



3D
21 I.A. 706

59876

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
KIYOSHI MOGI,	)	HONORABLE
	)	CHESTER J. STRZALKA,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant, in a trial without a jury, was convicted of theft (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1))* of two automobile tires valued at under \$150. He was sentenced to one year's probation and ordered to pay restitution in the amount of \$200. On appeal defendant contends that (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the court's failure to appoint an interpreter pursuant to statute deprived him of a fair trial; (3) the court's restitution order was invalid since there was no evidence in the record as to the value of the tires; and (4) the court erred in failing to advise him of his right to appeal and in refusing to grant his request to have the court clerk prepare a notice of appeal.

The following evidence was adduced at trial: Mary Pagent testified as the sole occurrence witness for the State that on September 13, 1973, at 11:30 or 12:00 in the evening, she was sitting on her front porch located at 4455 North Paulina Street, in Chicago, Illinois. At this time a red and black 1972 Dodge automobile, driven by a Mr. Dolton, parked nearby. About 15 to

* Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1), states:
"\$16-1. THEFT.) A person commits theft when he knowingly:
(a) Obtains or exerts unauthorized control over property of the owner; or
(1) Intends to deprive the owner permanently of the use or benefit of the property; or"

20 minutes later a 1972 Dodge pulled up behind the red 1973 Dodge, and defendant got out of the car. She later described this car variously as being a 1970 Dodge and a 1973 Dodge. Defendant walked over to Dolton's car and kicked the tire with his foot. A second man then got out of the vehicle defendant was in, and together they jacked up Dolton's car. They were removing the two rear wheels and putting two big rocks under the car when she hollered at them, and the man with defendant said, "It is my car." The tires were placed in the trunk of the Dodge and defendant then drove around the block and parked close to where these events took place. She then approached defendant's auto and wrote down the license plate number.

When she was asked if she recalled the number, all she could remember were the letters "RY." To refresh her recollection she was shown a copy of a police report. The following colloquy then took place:

"[Question by prosecutor]: I ask the witness to examine the license plate number on that report?

A: I know it was R.Y. R.Y.9970.

Q: Have you looked at this report?

A: Yes.

Q: Do you now remember what that license number was that you copied down?

A: R.Y. 9860."

There is a church that is across the street from where she lives. Behind the church is an alley. Dolton's car was parked near the alley by this church. She estimated the distance from this spot to where she was sitting as approximately 25 to 30 feet. Before September 13, 1973, she had seen defendant five or six times in the neighborhood. The tires that were removed were big and wide with a white trim around them. She could recognize the other man with defendant if she saw him. It took 30 to 35 minutes for the two men to remove the tires.

Chris Dolton testified as a witness for the State that he owns a 1972 red and black Dodge Charger. On September 13, 1973,

he parked his car at about 1700 Sunnyside Avenue. This was between 11:30 and 12:00 in the evening. The two rear tires on his car were Mickey Thompson H50's. They were real wide with white lettering. On September 14, 1973, the rear tires were gone. He never gave anyone permission to take the tires. He never saw who took the tires.

Police Officer Stack testified as a witness for the State that on September 17, 1973, he made an investigation of the theft of tires. Pursuant to this investigation he located a motor vehicle bearing a 1973 Illinois license number of R.Y.9816. The vehicle was in the 5900 block of Lincoln Avenue. The car was a green 1969 Dodge Charger. He ascertained that defendant owned this vehicle. He informed defendant, through a third person acting as an interpreter, about the theft. He was then informed that defendant had told the interpreter that defendant had at no time had anything to do with removing the tires. Defendant claimed he wasn't in the area when the alleged theft took place. Officer Stack never found the tires on or about defendant or in his automobile but did not make a search of his place of business. The tires were never recovered.

Defendant testified, through an interpreter, on his own behalf: On September 13, 1973, at approximately 11:30 P.M., he was at home with Hiromitsu Yoshimura, his roommate. He remained in his apartment until the next morning. He has seen Dolton's car before, but he denied ever taking the tires. At 8:15 A.M. on September 13, 1973, he saw Dolton's car with no back tires on it.

He owns a 1969 Dodge Charger with license number R.Y.9816. He has owned the car for 15 months and had paid \$1200 for it. On September 13, 1973, he parked his car a few blocks from his home. The car was not near 1700 West Sunnyside Avenue at this time. He parked around 11:00 P.M. After this, his car keys were with him in his apartment.

Hiromitsu Yoshimura testified as a witness for defendant that on September 13, 1973, he lived with defendant at 1611 West

Sunnyside Avenue. At 11:30 P.M. on the day in question he was watching TV at home. Defendant arrived home around 10:00 o'clock. Defendant watched TV with him until 1:00 A.M. and he was also packing. Defendant then went to sleep. Defendant never left the apartment during this time.

He is familiar with the intersection of Sunnyside Avenue and North Paulina Street. The building at 4455 North Paulina is a three floor apartment building. A church is located across the street from the building. Sunnyside Avenue runs along the side of the church and there is an alley running behind the church. The distance from the building at 4455 North Paulina to the alley behind the church is 150 to 200 yards. He then examined two photographs, defendant's exhibits one and two, and found they accurately represent the building, church and alley. Both these photographs were admitted into evidence.

On September 13, 1973, at approximately 8:15 A.M., he passed the 1700 block of Sunnyside Avenue on his way to work. At that time he saw a 1971 or 1972 red Dodge Charger without its two rear wheels.

Opinion

Defendant contends that the State failed to prove him guilty beyond a reasonable doubt. He argues that (1) the inconsistencies in Mary Pagent's testimony, (2) the unreliability of her observations, (3) the uncontroverted evidence of alibi, and (4) the lack of proof of criminal intent combine to raise a reasonable doubt of his guilt.

It was stated in People v. Gardner, 35 Ill.2d 564, 571, 221 N.E.2d 232:

"In a criminal case, it is incumbent upon the prosecution to prove beyond a reasonable doubt not only the commission of the crime charged but also its perpetration by the accused. * * * And while the identification and whereabouts of the defendant at the time of the crime are questions for the jury, yet, where from the

entire record there is a reasonable doubt as to the guilt of the accused, a judgment of conviction will not be permitted to stand. (People v. Ricili, 400 Ill. 309; People v. Gold, 361 Ill. 23.) Where the conviction of a defendant rests upon identification which is doubtful, vague and uncertain, and which does not produce an abiding conviction of guilt, it will be reversed. (People v. Fiorita, 339 Ill. 78; People v. Kidd, 410 Ill. 271.) Neither can we disregard the evidence of alibi where the sole and only evidence contradicting it rests upon the identity of the defendant as the man who committed the crime. People v. Peck, 358 Ill. 642; People v. De Suno, 354 Ill. 387. People v. McGee, 21 Ill.2d 440, 444."

The sole witness to identify defendant was Mary Pagent. Although she testified that she had seen him previously, her testimony is weakened by a number of factors. During her testimony she variously described the year of defendant's auto as 1970, 1972 and 1973. She also could only remember the first two letters of defendant's license number as R.Y. After seeing a copy of a police report, she stated that the license number was R.Y.9970 and then R.Y.9860, neither of which was defendant's license number. Her opportunity to observe must also be considered. It is uncontested that these events took place around 11:30 in the evening. No evidence was presented about the lighting in the area. She testified that the distance from where she was sitting at 4455 North Paulina Street to where Mr. Dolton's car was parked (which was near the alley behind the church) was approximately 25 to 30 feet. In direct contradiction was Yoshimura's testimony that he estimated the distance as being 150 to 200 yards. Additionally, defendant introduced into the record two photographs showing the building at 4455 North Paulina, the church and the alley behind the church. From an examination of these photographs it becomes evident that the distances involved more closely approximate Yoshimura's testimony than the testimony of Mary Pagent. The tires in question were never recovered. Officer Stack found no incriminating evidence to link defendant to the theft and when he first

confronted him, defendant denied any participation and stated that he had been at home. Nor was there anything in Officer Stack's testimony linking defendant's auto to the scene of the crime. Finally, defendant and his roommate, Yoshimura, both testified that defendant had been at home during the relevant time period.

Defendant further makes the contention that, assuming for the sake of argument, he was present at the scene, the State failed to prove beyond a reasonable doubt that he possessed the requisite criminal intent. The statute requires the State to prove that defendant "intend[ed] to deprive the owner permanently of the use or benefit of the property; * * *." [Emphasis supplied.] Since intent is not generally susceptible of direct proof, it has been held that intent may be proved from acts committed and circumstances in evidence. (People v. De Stefano, 23 Ill.2d 427, 178 N.E.2d 393.) "Although an intent to steal may ordinarily be inferred * * * proof of the existence of a state of mind incompatible with an intent to steal precludes a finding of theft." People v. Baddeley, 106 Ill. App.2d 154, 158, 245 N.E.2d 593.

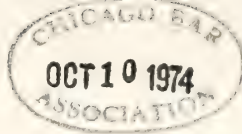
The State has argued that removing tires from a mechanically sound car at night is sufficient to infer the necessary intent beyond a reasonable doubt. To rebut this inference defendant refers this court to the testimony of the State's own witness who stated that when she yelled at the men removing the tires, defendant's companion yelled back at her that the car belonged to him. No evidence was presented showing that defendant knew that the car belonged to anyone other than his companion. Therefore, defendant maintains that the evidence only shows that he was assisting his companion in removing tires from a car which his companion had publicly admitted owning, and that a reasonable doubt that defendant had any criminal intent was raised.

We have reviewed the evidence in this case and the arguments made and find that viewing the record as a whole, a reasonable doubt of defendant's guilt has been presented. It is, therefore, unnecessary to reach defendant's other contentions. The judgment is reversed.

REVERSED

Sullivan, P.J., and Lorenz, J., concur.

Abstract.



3D
21 I.A. 769

58763

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
MANUEL JOHNSON,	)	HONORABLE
	)	LAWRENCE I. GENESEN,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Defendant was found guilty after a jury trial of unlawful use of weapons and failure to possess an Illinois State Firearm Owner's Identification Card in violation of Sections 24-1(a)(4) and 83-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 24-1(a)(4), 83-2). He was sentenced to a term of four months in the House of Correction on the Work Release Program on each charge, the sentences to run concurrently. On appeal defendant argues that the trial court erred in denying his motion to suppress the gun because it was seized incident to an unlawful arrest and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

On the motion to suppress and at trial the following evidence was adduced: Joseph McLaughlin, a Chicago police detective, testified that on April 7, 1971, at approximately 8:45 P.M., he proceeded to the pool hall at 2335 West Madison Street, Chicago, Illinois. Approximately five minutes prior to going to that location he had a conversation with an informer. Detective McLaughlin testified that the informer had worked for him from February until September 1971. The informer had given him information which had led to three guilty pleas on narcotics cases and one guilty verdict on a gun charge. He and his partner went to the pool hall with two other plainclothes detectives and two uniformed officers. As he entered the pool hall, he stated his office and told everybody to put the pool cues down. There

* Sullivan, P.J., Drucker, J., and Lorenz, J., participating.

were 30 to 40 people in the pool hall. Officer McLaughlin testified that he walked to the rear of the establishment where defendant was standing. As he got within eight to 10 feet of defendant, defendant turned around facing the wall and put his hand on his belt. Officer McLaughlin then saw something fall, landing between defendant's feet, and heard a thump. Defendant then turned facing the officers and put his feet over the object. Officer McLaughlin instructed defendant to move to the side, at which time he saw a gun lying on the floor. He identified the gun recovered from the pool hall as a .25 caliber automatic with two rounds of ammunition. Defendant was then placed under arrest and when asked to produce a State Firearm Owner's Identification Card was unable to do so; a search of defendant did not reveal any such card.

Anthony DeSeno, a Chicago police detective, testified that on April 7, 1971, at approximately 8:45 P.M., he proceeded to the pool hall at 2335 West Madison Street, Chicago, Illinois. Five minutes prior to going to that location he had a conversation with an informer. The informer told him there was a man in a pool hall with a pistol. The informer described the man as a male Negro with a purple headband, Indian style, and a black leather jacket. Officer DeSeno testified that he had prior conversations with this informer who had given him information in the past on three to five occasions. He and his partner entered the pool hall, announced their office and walked toward defendant at the rear of the pool hall. As he approached defendant turned away, and Officer De Seno heard an object fall to the floor. Defendant then turned facing the officers and stepped on the object with his foot. Officer DeSeno testified that he then recovered a .25 caliber automatic, with two rounds of ammunition, from under the defendant's foot. A search of defendant did

not reveal a State Firearm Owner's Identification Card, and defendant was unable to produce one. Defendant was dressed in a black leather jacket and a purple headband.

Defendant testified that on April 7, 1971, at approximately 8:30 P.M., he was in the pool room at 2335 West Madison, Chicago, Illinois. When the police entered, he was sitting at the shoe shine stand near the front door. The police ordered him to "get off the shoe shine stand and get on the wall." Defendant testified that he walked approximately 25 feet to the wall with the police officers walking behind him. The police officers were searching everyone in the pool hall and when the police officers came up to him, they said, "Here he is, this is the one." The officer then pulled him from the wall and produced a gun. Defendant testified that he did not at any time see a gun on the floor, he did not drop a gun to the floor, and he did not at any time have a gun in his possession. Defendant also denied that he was wearing a purple headband.

Odell Cobbes, Sr., testified that on April 7, 1971, during the evening hours at approximately 8:00 P.M., he was in the pool room at 2335 West Madison, Chicago, Illinois. When the police entered, he was shooting pool, and defendant was sitting on the shoe shine stand. The police officers ordered everybody up against the wall and conducted a search of everyone.

Eugene Scott testified that on April 7, 1971, at approximately 7:30 P.M., he was in the pool hall at 2335 West Madison, Chicago, Illinois. When police officers entered the pool hall, he was seated on the shoe shine stand next to defendant. The police ordered everybody to get up against the wall. Both he and defendant walked approximately 20 feet to the wall where they put their hands against the wall. He did not at any time see the defendant drop anything. He observed the police officer

bend over and when the officer came up he had a gun in his hand. The officers then took defendant out of the pool room. Scott testified that defendant was not wearing a headband.

Detective Anthony DeSeno testified in rebuttal that when he and his partner entered the pool hall, defendant was not seated on the shoe shine stand but was facing the door approximately 20 feet inside the pool hall. As they approached, defendant turned away from the officers and then turned back facing them.

Opinion

Defendant's first contention on appeal is that the trial court erred in denying his motion to suppress the gun because it was seized incident to an unlawful and warrantless arrest. Defendant urges that the informer was not shown to be reliable, and that the informer's information was insufficient to establish probable cause for his arrest. Even if we were to accept defendant's argument that the informer was not reliable and that his information was insufficient to establish probable cause for his arrest, defendant's motion to suppress was still properly denied.

In the case at bar the gun was not seized incident to an arrest. The police officers had a right to enter the pool hall since it was open to the public and is therefore not a constitutionally protected area. (People v. Carroll, 12 Ill. App.3d 869, 299 N.E.2d 134; People v. St. Ives, 110 Ill. App.2d 37, 249 N.E. 2d 97.) The fact that when the police officers entered they announced their office and told the 30 occupants of the pool hall to put down their pool cues did not constitute an arrest of anyone. (People v. Clay, 133 Ill. App.2d 344, 273 N.E.2d 254.) At the time the officers entered, defendant was not singled out in any way. The officers walked toward the rear of the pool hall and when they got 10 feet from defendant, he turned away from the officers, took something out of his belt and dropped it

to the floor. Defendant then again turned facing the officers and stepped on the object. Defendant's conduct was certainly suspicious, and the police officers had a right to investigate further. When defendant moved his foot, the officers observed in open view a .25 caliber pistol. The law is clear that no search is involved when the article seized is in plain view. In People v. McCracken, 30 Ill.2d 425, 429, 197 N.E.2d 35, the Supreme Court stated the rule when they said:

"Where, as here, the articles are in plain and open view and are observed by police officers under suspicious circumstances, it is not a 'search' nor an unreasonable seizure for the officers to make a reasonable investigation hereof [sic]."

(See also People v. Bombacino, 51 Ill.2d 17, 280 N.E.2d 697; People v. Tate, 38 Ill.2d 184, 230 N.E.2d 697; People v. Elmore, 28 Ill.2d 263, 192 N.E.2d 219; People v. Johnson, 15 Ill. App.3d 741, 305 N.E.2d 208.) It was only after the gun was observed that defendant was placed under arrest. When the officers saw the gun belonging to defendant on the floor beneath his foot, they clearly had probable cause to place him under arrest. (People v. Zazzetti, 6 Ill. App.3d 858, 286 N.E.2d 745; People v. Miles, 13 Ill. App.3d 453, 300 N.E.2d 822.) The trial court properly denied defendant's motion to suppress.

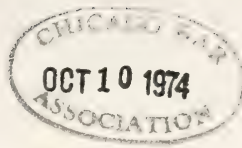
Defendant's second contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the testimony of the police officers was improbable and unsatisfactory. This court has often stated the rule that it is the function of the trier of fact to determine the credibility of witnesses, and his finding of guilty will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385; People v. Sturgis, 14 Ill. App.3d 181, 302 N.E.2d 114.

Defendant urges that Officer McLaughlin's testimony that the informer's information had led to three guilty pleas and one guilty verdict on the gun charge, without giving more details, gives rise to a strong inference that the officer manufactured this testimony. This argument by defense counsel is totally unsupported by anything in the record and is at best a mere conjecture. Defendant also urges that if the police were looking for only one man, they would not have had everyone line up against the wall, but that as they entered the pool hall, they announced their office and told everyone to put down their pool cues. However, the officers testified that not everyone in the pool room was searched. In the case at bar the jury saw the witnesses and heard their testimony. After a review of the entire record, we conclude that there is sufficient evidence to support the jury's finding that defendant's guilt had been established beyond a reasonable doubt.

The judgment is affirmed.

AFFIRMED.

Abstract only.



3D
21 I.A. 770

59636

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
JOSEPH PIERCE,)
)
Defendant-Appellant.) HONORABLE
MAURICE W. LEE,
PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Defendant was charged with the offense of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). After a bench trial, defendant was found guilty and sentenced to nine months in the House of Correction.

On appeal defendant contends the State failed to prove beyond a reasonable doubt the ownership of the allegedly stolen property; and that the defendant took unauthorized control over said property with the intent to permanently deprive the owner of the use and benefit thereof.

At trial Robert Harlan, a security guard for the Walgreen Drug Store, 4 North State Street, Chicago, Illinois, testified that on September 7, 1972, while working as a security guard, he observed defendant pick up a case of Wrigley's chewing gum, displayed as being on sale at the self-service candy counter area of the store, and saw defendant proceed in the general direction of the door. He stopped defendant about 20 feet from the door while defendant was carrying the case of gum in his arms. The price of the gum was \$58.80, although it was not so marked on the sales display or on the container.

Harlan testified that the store manager was with him when he stopped defendant; defendant said he was trying to price the gum for a friend of his; defendant asked the store manager what was

*Sullivan, P.J., Drucker, J., and Lorenz, J., participating.

the price of the gum; defendant said he was just trying to price the gum and not trying to steal it; and he had about \$1.70 in his possession.

Harlan further testified that although a drug counter remained between the door and the point of apprehension, defendant had passed four available cash registers and four sales personnel. Walgreen Drug Store is a corporation licensed to do business in the State of Illinois.

Defendant testified that he was in the store to price the Wrigley gum. Before being stopped by the security officer, he picked up the case of gum and stopped the manager and asked him how much the gum cost. On cross-examination defendant stated that he did not see the four sales personnel; that he saw one young lady who was busy; that he had only about \$1.70 in his pocket at the time he was stopped; and that he was pricing the gum for his uncle who owned a grocery store.

The trial court, before finding defendant guilty, stated:

"The Court believes that carrying around in the store a quantity of gum, sale price goes for \$58, is rather unusual conduct. The Court would believe the more reasonable conduct would be to find the item you're thinking about, find some personnel in charge and bring him over to ask him the question. These are the elements the Court takes into consideration. The Court further takes into consideration the man has \$1.70 with him is carrying around \$58 sale price."

In aggravation it was disclosed that defendant had six prior convictions for theft. In mitigation defendant stated that he is single and has worked in a supermart on and off for the past two years.

Opinion

On appeal defendant urges that he was not found guilty of theft beyond a reasonable doubt because the State failed to prove that the gum was the property of Walgreens. In a prosecution for

a theft, ownership or some form of superior possessory interest by one other than defendant is an essential element of the offense. (People v. Thomas, 9 Ill. App. 3d 384, 292 N.E.2d 153; People v. Roach, 1 Ill. App.3d 876, 275 N.E.2d 309.) Where it is alleged that the owner is a corporation, its legal existence as a corporation is a material fact which must be proved. People v. Gordon, 5 Ill.2d 91, 125 N.E.2d 73.

In People v. Nelson, 124 Ill. App.2d 280, 260 N.E.2d 251, the court held that testimony of one who was on duty as a security officer for "Sears and Roebuck," and references in his testimony and in that of others, including one of the defendants, to "Sears," "Sears and Roebuck," "Sears Corporation," "Sears Warehouse" and "Sears Distribution Center at 2065 George Street in Melrose Park" was sufficient to prove the existence of Sears, Roebuck as a corporation and its ownership of the property burglarized.

In the case at bar the complaining witness, a security guard for Walgreens, testified that the Walgreen Drug Store is a corporation licensed to do business in the State of Illinois. He also said that while acting as a security guard for Walgreens at 4 North State Street, Chicago, Illinois, he saw defendant pick up a case of Wrigley's gum, which was displayed as being on sale at the self-service candy counter area of the store. Defendant testified that he was in the store to price the Wrigley gum; that he picked up the case of gum, stopped the store manager and asked him how much the gum cost. The evidence sufficiently established Walgreens' corporate status and that the case of gum was the property of Walgreens.

Defendant also argues that the State failed to prove beyond a reasonable doubt that defendant's control over the gum was unauthorized or that he intended to permanently deprive Walgreens of the use and benefit of the gum. Harlan testified that he saw

defendant proceed with the case of gum in his arms, pass four cash registers and four store personnel to a point within the store about 20 feet from the door; that he stopped defendant and demanded an explanation of him; that defendant told him he was looking for a saleslady to price the gum for a friend; that defendant asked the store manager the price of the gum; that the manager stated the price was \$58.80; and that defendant had only \$1.70 on his person.

Defendant testified that he picked up the case of gum, stopped the manager and asked him how much the gum cost before being stopped by the security guard. At the time he had only \$1.70 in his pocket and was pricing the gum for his uncle, who owned a grocery store.

The trial court, in discussing the evidence, said "that the carrying around in the store a quantity of gum, sales price goes for \$58, was rather unusual conduct" since the defendant had only \$1.70 with him.

Defendant's intent to permanently deprive the owner of the use and benefit of the property can be inferred from the facts and circumstances surrounding the alleged criminal act. (People v. McClinton, 4 Ill. App.3d 253, 280 N.E.2d 795.) Further, when a defendant elects to take the stand and justify his actions, he must tell a plausible story or be judged by its improbability. (People v. Kaprelian, 6 Ill. App.3d 1066, 286 N.E.2d 613.) Nor is the trial court "required to believe the uncontradicted testimony of the defendant if it is so unreasonable as to be adjudged improbable, or so fantastic as to seem incredible." People v. Booher, 73 Ill. App.2d 226, 229, 218 N.E.2d 779.

In the case at bar the testimony of defendant was highly improbable. It was unreasonable and improbable that the defendant would pick up a case of gum worth \$58.80, walk past four store

personnel and not inquire as to the sale price of the gum until he was stopped by a security guard about 20 feet from the exit door. This is especially true when defendant had only \$1.70 on his person and when he made the improbable statement that he was pricing the gum for his uncle who owned a grocery store. Leaving aside the fact that defendant's testimony was partially contradicted, his testimony was so improbable and incredible that it contained its own impeachment.

Furthermore, there were conflicts in the evidence presented. Defendant stated there was only one sales person present while Harlan said there were four people present. Also, defendant claims to have spoken with the store manager before being stopped, while Harlan stated that he was accompanied by the manager when he stopped defendant.

It is the function of the trial court in a bench trial to determine the credibility of the witnesses and the weight to be given to their testimony. Its finding of guilty will not be disturbed on appeal unless the evidence is so unsatisfactory as to justify a reasonable doubt as to defendant's guilt. (People v. Benedik, 56 Ill.2d 306, 310, 307 N.E.2d 382.) Here the trial court chose to believe the testimony of the State's witness, and it cannot be said that determination was erroneous. We find that the evidence was more than sufficient for the trial court to determine that defendant took unauthorized control over the case of gum with the intent to permanently deprive Walgreens, the owner, of the use and benefit thereof.

The judgment is affirmed.

AFFIRMED.

Abstract only.



3D
21 I.A. 779

No. 56926

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY.
JEFFERY W. KING (Impleaded),)	HONORABLE
Defendant-Appellant.)	MEL R. JIGANTI,
	PRESIDING.

PER CURIAM:

Jeffery W. King and Godfrey Mitchell were both found guilty after a bench trial of the crime of burglary in violation of section 19-1 of the Criminal Code (Ill.Rev. Stat. 1969, ch.38, par.19-1.) Mitchell was placed on probation for a period of two years. King was sentenced to a term of one year to one year and one day. King alone appeals, arguing that the evidence was insufficient to establish beyond a reasonable doubt that his entry into the building was unauthorized.

At trial, Edward Higgins, the district manager for Checker Oil Company, testified that Checker Oil Company is the owner of the gas station at 6958 S. Stony Island Avenue, Chicago, Illinois. On September 11, 1970, at 2:00 A.M., pursuant to a call he proceeded to the station where he observed that the side window had been broken out. Higgins testified that this gas station is a franchise leased to Melvin Phillips.

Chicago Police Officers Thomas Earth and Bernard Riordan testified that on September 11, 1970, at approximately 2:00 A.M., they were driving their unmarked police vehicle in the 6900 block of Stony Island Avenue. As they approached the Checker gas station, which was closed, they observed an automobile parked in the station. Godfrey Mitchell was seated in the automobile and King was standing by the window of the station. The officers observed King kick out the window and remove two cans of oil from inside the station. As the officers

pulled into the station, King dropped the two cans of oil and kicked them underneath the car. When the officers attempted to place King under arrest, he began to swing at the officers.

King did not testify at trial nor did he present any evidence.

King's only argument on appeal is that the evidence failed to prove beyond a reasonable doubt that his entry into the building was unauthorized. King argues that the individual operator of the gas station could have given anyone, including himself, permission to break the window and remove the two cans of motor oil.

In People v. Hart, 132 Ill.App.2d 558, 270 N.E.2d 102, the defendant was convicted of burglary. The evidence adduced at trial demonstrated that at the time of the burglary, defendant was an employee of the company that was burglarized. On appeal, defendant argued that the evidence did not demonstrate that his entry was unlawful since he was an employee. This court rejected that contention, stating:

"Therefore, proof that at 5:40 A.M. on December 16, 1968, defendant, through a hole in the wall, entered Transoceanics warehouse when all doors were locked, proved beyond a reasonable doubt that he entered the burglarized premises without authority."

In the case at bar, the testimony adduced at trial demonstrated that the Checker gas station at 6958 S. Stony Island Avenue was owned by the Checker Oil Company and was operated by Melvin Phillips. On September 11, 1970, at 2:00 A.M., while the station was closed, King was observed breaking the window and removing two can of oil from the station. As the police officers approached, King dropped the cans of oil and kicked them under the car. When the officers attempted to place King under

arrest, he attempted to strike them. This evidence was sufficient to establish beyond a reasonable doubt that King entered the premises without authority.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Dempsey did not participate.



No. 58501

PEOPLE OF THE STATE OF ILLINOIS)	
ex rel. ROBERT LANCE,)	
	)	APPEAL FROM THE CIRCUIT
Relator-Appellant,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
RICHARD ELROD, Sheriff of Cook	)	JOSEPH A. POWER,
County,	)	PRESIDING.
)	
Respondent-Appellee.)	

PER CURIAM:

Robert Lance, relator, appeals from an order of the circuit court of Cook County quashing his petition for writ of habeas corpus which was filed upon his arrest by Illinois authorities pursuant to an extradition rendition warrant as a fugitive from justice in the State of Georgia. Relator here contends, as he did in the trial court, that the demand for extradition was in conflict with its supporting papers, raising a question of jurisdiction to assert the demand; that the demand for extradition was not sworn to before a magistrate, as allegedly required by statute; and that the circuit court of Cook County improperly proceeded with the instant matter whereas a postponement of the execution of the rendition warrant had been ordered by the office of the governor of Illinois pending a consideration of the decision to extradite.

On September 24, 1971, the governor of the State of Georgia issued a demand upon the governor of the State of Illinois for the apprehension and return of relator on the grounds that he had been convicted and sentenced in Georgia for the offense of robbery and that he subsequently escaped confinement, fled that jurisdiction and took asylum in Illinois. The demand was accompanied by copies of the indictment, the judgment of conviction and sentence, a petition from the Georgia board of corrections seeking the Georgia governor's order of extradition and an order of dismissal of relator's appeal from that conviction. The rendition warrant issued by the governor of Illinois recited

that the demand from the Georgia governor was supported by a copy of an indictment for the offense of robbery committed in Georgia on July 6, 1968, and an escape from confinement in that jurisdiction on September 26, 1969.

The instant petition for writ of habeas corpus was filed by relator on November 15, 1971, raising, inter alia, the foregoing issues concerning the demand by the Georgia governor and its supporting papers, and was supplemented on January 10, 1972, with a petition amplifying the grounds theretofore raised. The hearing on the petition was continued from time to time, and the record discloses that the office of the governor of Illinois had ordered a hold on the execution of its rendition warrant pending a consideration of its decision to extradite; it further appears that relator's counsel personally travelled to the State of Georgia to effect a solution to the matter, but to no avail.

On January 15, 1973, relator filed a motion to strike the return of the sheriff to his petition for writ of habeas corpus and for discharge of relator; the motion was based upon the same grounds as raised in the petition for the writ, relative to the demand and its supporting papers, and also raised the question of whether the sheriff could make a return to the petition for the writ while the matter had been postponed pending a determination by the governor's office of its decision to extradite. The motion to strike was accompanied by a memorandum which alleged that on August 6, 1971, relator had been arrested by the Alsip (Illinois) police relative to a domestic disturbance, through which it was determined that he was wanted as a fugitive from justice by the State of Georgia; that he was incarcerated in the Cook County Jail until November 10, 1971, on which date he was released because the State of Georgia had taken no further action against him; that he had lived a new, orderly life in Illinois with his wife and family, and intended to remain in Illinois; that on November 15, 1971, he voluntarily

surrendered to Illinois authorities upon the issuance of the rendition warrant; and that the hearing on his petition for the writ of habeas corpus was continued from time to time pending a determination by the governor of Illinois whether relator should be extradited, the execution of the rendition warrant having been stayed for that reason.

At the hearing on January 15, 1973, much of the foregoing matters were brought out by relator's counsel, and it was also developed that the office of the governor of Illinois at that time would not object to a rendition of the extradition warrant. It appears that correspondence from that office, not appearing as an exhibit in the instant record, bore on the question of the stay of the execution of the rendition warrant. The rendition warrant, the demand by the governor of Georgia and its supporting papers were admitted into evidence at that hearing; the relator there denied that he was convicted on July 6, 1969, of the Georgia robbery; his petition for writ of habeas corpus was denied, and he was remanded to the custody of the demanding State.

Relator's contention challenging the sufficiency of the demand of the Georgia governor and its supporting papers is without merit. The Uniform Criminal Extradition Act requires that the demand made upon the asylum State be accompanied by either a copy of an indictment or information supported by affidavit, or by a copy of a warrant issued in the demanding State and an affidavit executed there before a magistrate, or by a copy of the judgment or sentence imposed, with an appropriate attestation by the governor of that State. Ill.Rev.Stat. 1973, ch.60, par.20. Relator's argument that the Georgia governor's demand was predicated upon the conviction, whereas the supporting papers show an indictment, is obviated by the inclusion of a copy of the judgment of conviction in the supporting papers, thereby conforming to the statutory requirement in this regard.

Further, the discrepancy which exists between the demand and the rendition warrant, that the former is based upon the conviction while the latter cites to the indictment, does not create a jurisdictional deficiency. The inclusion of the indictment and of the judgment of conviction into the supporting papers rectified any deficiency which may have existed upon the face of the rendition warrant. See May v. Sexton, 35 Ill.2d 585, 221 N.E.2d 283, citing to People ex rel. Ritholz v. Sain, 24 Ill.2d 168, 180 N.E.2d 464, which is cited by relator in support of his position.

In response to relator's second contention, that the paper petitioning the governor of Georgia to issue his demand to Illinois was not sworn to before a Georgia magistrate, it need only be said that the Georgia governor's demand was based upon relator's conviction while the rendition warrant was based upon his indictment and that neither of those documents must be attested to, or witnessed before a magistrate under the terms of the statute. Ill.Rev.Stat. 1973, ch.60,par.20.

Finally, relator's contention that the circuit court of Cook County improperly proceeded to a conclusion of the case while a hold had been placed upon the execution of the rendition warrant by the office of the governor of Illinois is also without merit. Evidence was adduced at the hearing on January 15, 1973, relative to the question of whether the postponement was then still in effect. The transcript of those proceedings indicates that correspondence not appearing in this record was before the trial judge and that he considered such correspondence in arriving at a conclusion of this matter. Absent a showing by relator, as appellant, that the evidence adduced did not support the court's conclusion, this court will presume that the trial court considered evidence properly supporting its determination in the matter. Perez v. Janota, 107 Ill.App.2d 90, 246 N.E.2d 42.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE MEJDA did not participate.



3D

21 I.A. 787

No. 59161

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY.
EDWARD J. CASEY, JR.,)	HONORABLE
Defendant-Appellant.)	LAWRENCE I. GENESEN,
	PRESIDING.

PER CURIAM:

Edward J. Casey, Jr., defendant, was charged with driving a motor vehicle under the influence of intoxicating liquor in violation of Ill.Rev.Stat. 1971, ch.95-1/2, par. 11-501. After a jury trial, he was found guilty and fined \$140 plus \$25 costs. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt, and that he was prejudiced by the prosecutor's closing argument and by the judge's comments in ruling on defense counsel's objection to the prosecutor's argument.

At trial, James Damion, a Chicago police officer, testified that on January 17, 1972, at 1:05 A.M., he was driving his marked police vehicle northbound on North Michigan Ave. when he observed the defendant driving a vehicle southbound in the 900 block of Michigan Ave. Defendant's car was in the far right hand lane and suddenly, in the middle of the block, veered into the far left hand lane and then back into the far right hand lane. Officer Damion immediately made a U-turn and put on his Mars light in an attempt to stop defendant's vehicle. During the first block defendant did not stop his vehicle and was again crossing lanes moving into the left hand lane and then back into the right hand lane. Officer Damion turned on his siren and after another 2-1/2 blocks, defendant stopped his vehicle in the center of an intersection after going through a red light. Officer Damion testified

that as he spoke to the defendant he detected a strong odor of alcohol on the defendant and in the defendant's vehicle, defendant's face was flushed and very red, defendant's speech was slurred, and his eyes were bloodshot. He asked defendant to get out of his vehicle and step over to the squad car. Defendant did not comply with his request and the officer again requested defendant to exit his vehicle. Defendant then said "For what?". Officer Damion testified that he informed the defendant that in his opinion he had been drinking. The defendant at this time said "So what, it was his car, he pays his taxes and he can drive". Defendant finally exited his vehicle and Officer Damion testified that he had to hold defendant's arm because defendant was staggering from side to side. Defendant was transported to the police station. Officer Damion testified at the the police station, defendant was staggering in the interrogation area and at one point fell against a tile wall. He testified that he helped defendant to sit down on a chair. Officer Damion testified that he had been a police officer for 6-1/2 years and during that period of time had seen over one hundred people who were under the influence of alcohol. He stated that based upon his experience as a police officer and his observation of the defendant it was his opinion that the defendant was under the influence of intoxicating liquor.

Edward J. Casey, Jr., defendant, testified that on January 16, 1972, he drove to the city of Chicago from his home in Kankakee, Illinois. At approximately 6:15 he went to the Drake Hotel for Sunday buffet. Defendant testified that between 6:15 and 9:20 P.M. he stayed at the Drake Hotel where he had dinner and seven Manhattans. Defendant identified a Manhattan as containing approximately two ounces of liquor. At approximately 9:20, defendant left the Drake Hotel and walked four blocks to a lounge on Rush Street. Defendant stayed in the lounge for approximately 45 minutes during which time he had two

more drinks. Defendant testified that he then retrieved his car and drove slowly toward Michigan Ave. Defendant testified that when he turned from Oak Street onto Michigan Avenue his car did go into the left hand lane. Defendant testified that on a second occasion he moved into the left hand lane because there was a taxi cab making a turn in the right hand lane. Defendant testified that as his vehicle stopped for a stop light on Ontario and Michigan, he observed Officer Damion turn on his Mars lights but could not understand what the officer was after. Defendant stated that Officer Damion stopped his vehicle and ordered him into the squad car. He exited his vehicle, walked over to the police vehicle, opened the door and stepped into the back seat. He was thereafter transported to the police station by police van. Defendant testified that as he was getting out of the van at the police station he missed the step and tripped. He stated that this is the only incident during the evening when he had any difficulty controlling his movements. Defendant stated that at the police station he was escorted into the interview room where he stood and waited until Officer Damion arrived. Thereafter, Officer Damion asked him to take a Breathalyzer test and he refused. After he was charged with driving under the influence of intoxicating liquor, he was allowed to make a telephone call and placed in a cell until friends were able to post bond. He remained in the police station until 6:30 A.M. Defendant testified that during his entire stay in the police station, he did not at any time sit down.

Harry Johnson testified that he has known the defendant for 25 years. He has found the defendant to be an honest and forthright individual. The defendant was always able to handle his alcoholic beverages in an adult manner.

Defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because no performance tests were administered and no explanation

was given for the failure to administer such tests. To establish defendant's guilt beyond a reasonable doubt, the State was required to prove that the defendant was driving a motor vehicle and was under the influence of an intoxicating liquor. It is within the province of the trier of fact to weigh the evidence and determine the credibility of witnesses. People v. Foster, 114 Ill.App.2d 357, 252 N.E.2d 722.

In the case at bar, Officer Damion testified that on January 17, 1972, at approximately 1:05 A.M., he observed defendant driving down Michigan Avenue, veering from the right lane to the left lane and then back into the right lane. He attempted to stop the defendant by using his Mars light and defendant did not respond. He then turned on his siren and defendant still did not stop his vehicle for two and one-half blocks. When defendant finally stopped his vehicle, he went through a red light and stopped in the middle of the intersection. Officer Damion testified that there was a strong odor of alcohol on the defendant and in his vehicle. Defendant's face was flushed and very red, his speech was slurred, his eyes were bloodshot, his balance was asway and he staggered as he walked. Officer Damion testified that he helped defendant walk to the police vehicle. While in the police station, defendant was still staggering and at one point fell against a tile wall. Officer Damion testified that he helped defendant over to a chair. Defendant, in his own trial testimony, admitted that in the six-hour period preceding his arrest, he consumed 12 drinks. Officer Damion testified that he had seen over 100 people under the influence of intoxicating liquor and that in his opinion, based upon his experience and observations of the defendant, the defendant was under the influence of intoxicating liquor. The testimony of Officer Damion was positive and credible, and sufficient to support defendant's conviction beyond a reasonable doubt. Under these circumstances, the failure to administer performance tests to the defendant

does not require reversal. People v. Winfield, 15 Ill.App. 3d 688, 304 N.E.2d 693.

Defendant's next contention is that the prosecutor's closing argument was improper and that the judge's comment in ruling on a defense objection to the argument denied him a fair trial. During the prosecutor's initial closing argument, the following occurred:

"MR. STROKA (Assistant State's Attorney):
...As we all know approximately about twenty-five thousand people a year are killed--

"MR. VOGEL (defense counsel): Objection, your Honor.

"THE COURT: It may or may not be a matter of general knowledge. Counsel may argue the enforcement of law and the evils of the particular offense involved. I will let him proceed in this manner with the understanding that this is a matter that it is within the jury's knowledge they may consider it and if not, they can disregard it.

"MR. STROKA: It is well known to you jurors and to the public at least that approximately twenty-five thousand people a year are killed, killed at the hands of drivers who drive under the influence of alcohol."

Defendant now argues that this statement prejudiced him in that the jury could infer that the defendant was one of the drivers who had killed people during the year. Defendant's argument is not supported by the record. The prosecutor's comment was in no way directed to the premise that defendant could have been one of the drivers who had killed people during the year nor could that be inferred from the prosecutor's statement.

The rule is well established that in closing argument the prosecutor may argue the evil results of a crime, urge fearless administration of justice and denounce the accused's wickedness. (People v. Galloway, 14 Ill.App.3d 863, 303 N.E.2d 231. Here, the prosecutor's argument that thousands of people are killed every year by people who drive while under the influence of alcohol was a proper subject of argument since defendant was charged with driving under the influence of intoxicating liquor.

(People v. Morgan, 28 Ill.2d 55, 190 N.E.2d 755.) The prosecutor's argument, considered in light of the entire closing argument, was not improper and did not in any way prejudice the defendant. It also follows that the trial judge's comments in ruling on defense counsel's objection were not improper.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.



3D

121 I.A. 788

No. 59655

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. ROBERT COOK,) APPEAL FROM THE CIRCUIT
Relator-Appellant,) COURT OF COOK COUNTY.
v.) HONORABLE
JOHN W. TWOMEY,) JOSEPH A. POWER,
Respondent-Appellee.) PRESIDING.

PER CURIAM:

Robert Cook, petitioner, appeals the dismissal of his pro se petition for a writ of habeas corpus contending that the trial court erred when it summarily dismissed his petition.

Petitioner was originally convicted on April 16, 1964, upon his plea of guilty to the crimes of murder and armed robbery. On July 26, 1972, petitioner filed a pro se petition for writ of habeas corpus. The petition alleged that he was being illegally incarcerated because the indictment upon which he was convicted was not signed by the foreman of the grand jury. Private counsel was appointed to represent petitioner. Subsequently, the State filed a motion to dismiss the petition. On November 16, 1972, when petitioner's case was called, private counsel did not appear. The assistant public defender informed the trial judge that the public defender had been granted leave to withdraw and that private counsel had been appointed. The assistant State's attorney informed the trial judge that the State had filed a motion to dismiss. The trial judge, without further inquiry, granted the State's motion to dismiss.

Petitioner's only argument on appeal is that the trial court violated due process, equal protection and the court's own rules when it summarily dismissed the petitioner's petition for writ of habeas corpus in a summary fashion outside the presence of appointed counsel.

The Illinois Habeas Corpus Act provides for a writ only where the trial court lacked jurisdiction or where something

has occurred since the original judgment which would entitle a prisoner to a release. (People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378.) The remedy of habeas corpus is not available to review errors of a non-jurisdictional nature, even though they may involve the claim of denial of a constitutional right. People ex rel. Lewis v. Frye, 42 Ill.2d 58, 245 N.E.2d 383.

In the case at bar, petitioner's pro se petition for writ of habeas corpus alleged that he was being illegally incarcerated because the indictment upon which he was convicted was not signed by the foreman of the grand jury. In People ex rel. Merrill v. Hazard, 361 Ill. 60, 196 N.E. 827, the Supreme Court held that the signature of a foreman of the grand jury is required only as a matter of direction to the clerk and for the information of the court, and that its presence or absence does not materially affect the substantial rights of a defendant, since it neither assures him nor prevents him from having a fair trial. (See, also, People ex rel. Byrd v. Twomey, 2 Ill.App.3d 774, 277 N.E.2d 358.) Here, the allegations of petitioner's pro se petition for writ of habeas corpus did not fall within the purview of the Habeas Corpus Act and the petition was properly dismissed by the trial court.

The only remaining question is whether the dismissal of petitioner's pro se petition for writ of habeas corpus, in the absence of appointed counsel, was reversible error. Since the only allegation of petitioner's pro se petition was totally devoid of merit and was not recognizable under the Habeas Corpus Act, any amendment to the petition which could be meritorious would be a completely new allegation and would, in effect, be an entirely new petition. Under the Habeas Corpus Act, the petitioner is not prohibited from filing a second petition for a writ of habeas corpus alleging different grounds. (People ex rel. Carlstrom v. Shurtleff, 355 Ill. 210, 189 N.E. 291.) While appointed counsel should have been present at the time the State's motion to dismiss was granted, in light of the fact that the

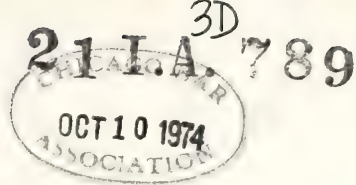
petition was totally devoid of merit and the fact that petitioner is not prohibited from filing a second petition for writ of habeas corpus alleging different grounds, we conclude that the trial court's dismissal in the absence of appointed counsel was not reversible error.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE MEJDA did not participate.

T. 1. 14
me kin
100 pin



NO. 58971

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
PAUL WRIGHT, otherwise called	)	HONORABLE
JAMES E. COUNCIL (impleaded),	)	LOUIS B. GARIPPO,
	)	PRESIDING.
Defendant-Appellant.)	

Per Curiam: First District, Second Division.

Before Hayes, P.J., Leighton and Downing, JJ.

Defendant, Paul Wright, otherwise called James E. Council, was found guilty after a bench trial of armed robbery of Charles Hernandez and Clara Austin, in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2), and sentenced to a term of not less than five years and not more than ten years in the Illinois State Penitentiary.

On appeal defendant contends that he was not proven guilty of armed robbery beyond a reasonable doubt; and that the sentence was excessive under the Unified Code of Corrections.

Clara Austin testified that on December 30, 1971, she was the manager of a liquor store and tavern at 3557-59 West Chicago Avenue, Chicago; that between twelve noon and one o'clock a man, whom she identified at the trial as Nelson Jones, walked into the liquor store, put a gun in her face, and made her give him approximately \$13 from the cash register; and that Jones then forced her and the other patrons to go to the washroom. Defendant and Percy Nero, who were with Jones, were in the tavern portion. One of them was standing at the door and the other near the jukebox.

Mrs. Austin further testified that while she was in the washroom she heard a shot; and that after staying in the washroom for about five minutes, she came out and observed the men waiting in a squad car, which was parked in front of the store.

Wardell Sykes, the owner of the tavern and liquor store, testified that he was in the washroom when he heard someone say, "Give it here"; and that he peeked out of the washroom and saw Nelson Jones with a gun at Mrs. Austin's, his sister-in-law, head. Sykes heard shots and saw the policemen put Jones, Nero, and defendant into a squad car. On cross-examination, Sykes testified that he did not see defendant with a gun that day; that he did not see him take any money from anyone; and that he didn't hear defendant tell anyone to give him their money.

Charles Hernandez, a whiskey salesman, testified that on December 30, 1971, he was in the tavern at 3557 West Chicago Avenue, Chicago; that about 12:15 P.M. a man walked into the store and "put a pistol on me"; that he pointed at the lady behind the counter and said, "This is a stickup"; that defendant and Nero were there; and that Jones rifled his pockets. Hernandez further testified that defendant had a pistol on the bartender, Robert Vaughn, and Nero was looking out of the window; that the people were herded into the washroom by defendant; that some shots were fired; that, after waiting a few minutes, the patrons came out of the washroom; and that he saw the three men again outside the store. Hernandez identified State's Exhibit No. 2 as the gun held by defendant on the bartender.

Police Officer Gerald Scala testified that on December 30, 1971, he was working with Police Officers Ingraffia and August; that they were in an unmarked vehicle and stopped at the tavern located at 3557 West Chicago Avenue, Chicago; that

Ingraffia went to the washroom; that, while Scala was in a hallway separating the tavern and liquor store, Jones pointed a gun at him and said, "Stick your hands up, this is a holdup"; and that Scala fell to his knees and crawled out to the front door, where he advised Police Officer August that a robbery was in progress. Scala further testified that he and August heard some shots fired and as they ran behind a car for cover, he saw defendant and Nero leave the premises; that Nero headed toward the vehicle the police officers were behind for cover, and got behind the passenger's side; and that defendant threw a revolver under the front seat. Scala identified State's Exhibit No. 2 as the weapon defendant threw under the front seat of the vehicle and also identified State's Exhibit No. 3 as the ammunition taken from the gun. Scala further testified that Jones came out of the tavern with a gun in his hand (State's Exhibit No. 1), which he dropped when he saw the police officers. The weapon was loaded at the time with ammunition which Scala identified as State's Exhibit No. 4.

Police Officer Joseph August testified that on December 30, 1971, at approximately 12:30 in the afternoon, Police Officers Ingraffia and Scala had occasion to enter the tavern at 3557 West Chicago Avenue, Chicago; that he stayed outside in the car and waited for them; that in a few seconds Scala came running out of the tavern and told August that there was a holdup in the tavern; that he saw defendant running out of the front door with a gun in his hand and running across Central Park to an old blue Chevvy that was parked there; that August covered defendant and Nero with his gun and told them not to move, to put their hands up; and that he recovered the gun defendant had in his hand when he ran out of the tavern, a .32 caliber gun (State's Exhibit

No. 2), together with the bullets which were in the gun (State's Group Exhibit No. 3).

Police Officer Sebastian Ingraffia, called as a witness for the defendant, testified that he was in the tavern at 3559 West Chicago Avenue, Chicago, while it was being held up; that he fired at Nelson Jones, who fled the premises; and that, when he came outside, defendant and Nero were being arrested.

Defendant did not testify.

Defendant contends that the evidence was so inconsistent, improbable, and contrary to human experience that the People failed to prove defendant guilty beyond a reasonable doubt.

Contrary to defendant's contention, the evidence clearly shows that defendant participated in the holdup of the liquor store and tavern at 3557-59 West Chicago Avenue, Chicago, Illinois, on December 30, 1971. Clara Austin, the manager of the liquor store, identified defendant as one of the men who participated in the holdup. Charles Hernandez testified that defendant had a pistol on the bartender, Robert Vaughn, at the time of the holdup; and that it was defendant who herded the patrons into the washroom. Wardell Sykes, the owner of the tavern, testified that he heard shots and saw a policeman putting Jones, Nero, and defendant into a squad car in front of the tavern.

Police Officers Scala and August testified that they heard shots being fired and observed defendant leaving the premises. August testified that he saw defendant run out of the front door of the tavern with a gun in his hand; and that August recovered the gun from under the driver's side of the automobile.

The law is well established that in a bench trial it is the duty of the trial judge to determine the credibility

of the witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to the defendant's guilt will the finding of the trial court be disturbed. (People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385; People v. Pointer, 6 Ill. App. 3d 113, 285 N.E. 2d 171.) Minor discrepancies and inconsistencies do not destroy the credibility of the witnesses, but affect only the weight to be given to such testimony. People v. Reese, 54 Ill. 2d 51, 294 N.E. 2d 288; People v. Strother, 53 Ill. 2d 95, 290 N.E. 2d 201.

In the case at bar, there was positive uncontradicted evidence that defendant participated in the holdup and had a loaded revolver in his hand. Defendant was proven guilty of armed robbery beyond a reasonable doubt.

Defendant argues that the minimum sentence of five years imposed by the trial court, which was the absolute minimum sentence under the law in effect on the date of the armed robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-2(b)), should be reduced to four years as provided for under the Unified Code of Corrections (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1). Section 5-8-1 of the Unified Code of Corrections provides in part as follows:

"(2) For a Class 1 felony, the minimum term shall be 4 years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term."

Armed robbery is a Class 1 felony (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 18-2(1)).

In People v. Harvey, 53 Ill. 2d 585, 294 N.E. 2d 269, it was held that the sentencing provisions of the Unified Code of Corrections apply to cases pending on appeal on the effective date of the Code, when those sentencing provisions are less than the sentence provisions in effect at the time

the sentence was imposed. Therefore, the provisions of the Unified Code of Corrections apply in the case at bar because the new absolute minimum sentence of four years is less than the absolute minimum sentence of five years which was in effect when defendant was sentenced.

In light of the foregoing, the judgment of the trial court is affirmed and the cause is remanded to the trial court to determine whether, under the record, defendant should be sentenced to a minimum sentence of four years under the Unified Code of Corrections or whether defendant should receive the higher minimum term of five years originally imposed. People v. Fuller, Second District, No. 72-310, opinion March 19, 1974.

Judgment affirmed and cause remanded.

Publish abstract only.

NO. 59438



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
MICHAEL B. KUKNYO, a/k/a	)	HONORABLE
ROBERT C. HOLMAN,	)	PHILIP ROMITI,
	)	PRESIDING.
Defendant-Appellant.)	

Per Curiam: First District, Second Division.

Before Stamos, J., Leighton, J. and Downing, J.

Michael B. Kuknyo, a/k/a Robert C. Holman, defendant, was convicted upon his pleas of guilty to an indictment charging him with one count of theft and two counts of forgery in violation of sections 16-1(a)(1) and 17-3(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 16-1(a)(1) and 17-3(a)(1)). He was sentenced to a term of one to three years on each charge, the sentences to run concurrently.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are (1) that the trial court failed to comply with Supreme Court Rule 402 in accepting defendant's plea of guilty; (2) that defendant was improperly sentenced for three crimes arising out of the same course of conduct; and (3) that the trial judge admitted improper evidence during the hearing in aggravation and mitigation. The brief in effect concludes that an appeal on these issues would be wholly frivolous and without merit. This court mailed copies of the motion and brief to defendant on April 29, 1974. Defendant was informed

that he had until June 28, 1974, to file any additional points he might choose in support of his appeal. He has responded.

The first possible argument which could be raised on appeal is that the trial court, in accepting defendant's plea of guilty, failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402), which sets forth the procedure which must be followed by a trial judge in accepting a plea of guilty.

Here, the record demonstrates that on April 3, 1973, when defendant's case was called, defense counsel, in defendant's presence, informed the trial judge that defendant wished to withdraw his previously entered plea of not guilty and enter a plea of guilty. The trial judge questioned the defendant and ascertained that there had been no pretrial conference and no agreement between the defendant and the State or the court as to any sentence which might be imposed. Defendant was carefully read each charge of the indictment and stated that he understood the nature of the charges against him. Defendant was specifically advised that he had a right not to incriminate himself and that by pleading guilty, he would be giving up this right. The trial judge also informed the defendant that he had a right to confront his accusers and defendant stated that he understood that he would waive this right by entering a plea of guilty. Defendant was advised that he had a right to plead not guilty and to persist in that plea. The trial judge carefully informed the defendant that he had a right to a trial by jury or, in the alternative, a right to a bench trial, and that by entering a plea of guilty, he was waiving these rights and there would be no trial of any type. Defendant stated that he understood. Defendant was admonished as to the maximum and minimum possible sentences for each of the crimes charged. Defendant

stated that he was entering a plea of guilty voluntarily and that there had been no coercion or threats against him to induce the plea. The trial judge, through a stipulation of evidence, determined that there was a factual basis for the plea of guilty. Defendant's plea of guilty was then accepted. After a complete review of the record, we conclude that the trial judge complied with every provision of Supreme Court Rule 402.

The second possible argument which could be raised on appeal is that the defendant was improperly sentenced for three offenses, since they all arose out of the same course of conduct. A defendant cannot be sentenced for two offenses if each offense arises from the same conduct. (People v. Stewart, 45 Ill. 2d 310, 259 N.E. 2d 24.) However, where the facts of the case demonstrate that separate and distinct conduct resulted in the commission of more than one offense and that the acts and accompanying mental states were separate and apart, although closely related in time, conviction for each offense is proper. People v. Smith, 12 Ill. App. 3d 507, 299 N.E. 2d 492.

In the case at bar, defendant was convicted of theft in that between January 26, 1971 and February 19, 1971, he took 10 checks from Mutual Trust Life Insurance Company, and two counts of forgery in that on February 5, 1971, he knowingly delivered to the First National Bank two separate checks made out to the order of Jack Spear in the amounts of \$4,819.65 and \$3,710.25. It is clear that defendant's conduct in stealing the checks from the Mutual Trust Life Insurance Company was completely separate and required a different mental state from his conduct in forging the endorsements on those checks and their delivery to the First National Bank. Similarly, the two checks delivered to the First National Bank, although deposited upon the same day, were separate checks and required

separate acts on defendant's part. Since each of the crimes with which defendant was convicted required separate conduct and a distinct mental state, defendant was properly sentenced to concurrent terms on each of the three charges.

The third possible argument which could be raised on appeal is that the trial court considered improper matters in sentencing. During the hearing in aggravation and mitigation, the assistant state's attorney offered into evidence a certified copy of defendant's conviction in the State of California for issuing a check without sufficient funds. Defense counsel objected on the basis that the California conviction was not a felony and that the sentence defendant received was under a procedure analogous to supervision in this State. A trial judge is presumed to recognize any incompetent evidence introduced at the pre-sentence hearing and to disregard it. (People v. Bey, 51 Ill. 2d 262, 281 N.E. 2d 638.) In the case at bar, there is nothing which would overcome this presumption. The pre-sentence investigation disclosed that, other than the California conviction, defendant had several other prior convictions. The sentence imposed upon the defendant was the minimum possible penitentiary sentence for the offense charged. Considering all of the facts adduced at trial and defendant's prior record, the sentence imposed was not unreasonable.

Defendant, in his response to this court, argues that he was denied his right to a speedy trial. The Sixth Amendment to the United States Constitution guarantees the right to a speedy trial and is applicable to the States through the operation of the Fourteenth Amendment. (Klopfer v. North Carolina, 386 U.S. 213.) The Illinois Constitution, Article I, section 8, contains a similar guarantee. Section 103-5 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 103-5) is

an enactment of those guarantees. However, the right to a speedy trial is not jurisdictional and a plea of guilty voluntarily entered waives the right of a defendant to a speedy trial. People v. DeCola, 15 Ill. 2d 527, 155 N.E. 2d 622; People v. Swansey, 7 Ill. App. 3d 1042, 288 N.E. 2d 646.

In the case at bar, the record indicates that the defendant entered a plea of guilty to an indictment charging him with one count of theft and two counts of forgery. Defendant entered his plea voluntarily after a consultation with counsel and admonitions by the trial court. Having entered a voluntary plea of guilty, defendant waived his right to a speedy trial.

We have examined the record and concur in the opinion of the public defender that the arguments thus raised do not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;
Judgment affirmed.

Publish abstract only.



3D
21 I.A. 791

No. 59570

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
JAMES JACKSON,	)	JACK I. SPERLING,
Defendant-Appellant.	)	JUDGE PRESIDING.

Per Curiam: First District, Second Division.

Before Hayes, P.J., Leighton and Downing, JJ.

James Jackson (defendant) was found guilty after a bench trial of the offense of theft in violation of section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)) and was sentenced to a term of 90 days in the House of Correction. On appeal he contends that he was not proven legally accountable for the conduct of another beyond a reasonable doubt.

The complaining witness testified that on June 15, 1973, she had visited the bank and was carrying \$120 in cash in a wallet inside her handbag, 2 one dollar bills of which had been peculiarly marked in red. The witness and her mother were waiting for a bus at Lake Street and Pulaski Road, and several seconds prior to the arrival of the bus she had opened her handbag, which she carried slung over her left shoulder, for the purpose of removing a tissue; at that time she noticed that the wallet was in the bag; she thereupon closed the clasp of the bag, which was facing away from her body.

Her mother boarded the bus, and, as the witness was preparing to board, two men approached from her left side, "jumped in front" of the witness, and boarded the bus ahead of her. She identified one of the men as the defendant, who was the first of the two to board the bus ahead of her, and she described the second man as the defendant's brother, who boarded the bus immediately ahead of the witness. After the witness had

boarded the bus, the defendant and his brother "pinned" her between them at the farebox as she attempted to give the driver her transfer; the defendant's brother was brushing against her while the defendant was about a foot away, ahead of and to the side of the witness; the witness was unable to move at this time. When the witness arrived at her seat, she noticed that her handbag was open and her wallet gone; she notified the driver of this fact, who stated that he would stop if he saw a police officer. An officer was summoned about five minutes later at Chicago Avenue and Pulaski Road, at which time defendant and his brother were still aboard the bus. The witness saw neither man enter her purse. Only the witness, her mother, and the defendant and his brother boarded the bus at Lake and Pulaski.

The arresting officer testified that he performed a protective, pat-down search of defendant, which disclosed nothing, after which he placed defendant and his brother into a squad car; the officer observed defendant's brother moving about in the rear seat of the vehicle, with his hand behind him. Upon determining the two men were "prime suspects" in the theft, a more thorough search of their persons disclosed the sum of \$118 in cash in defendant's brother's lefthand pocket and the sum of \$18 in his righthand pocket; the officer was informed of the peculiarly marked bills theretofore in the complaining witness's possession and a search of the area of the police car where defendant's brother had been seated disclosed the presence of those bills under the seat. Defendant and his brother were placed under arrest.

Defendant testified in his own behalf and denied the theft from the complaining witness, denied seeing her on the bus, and denied that his brother was near her. Defendant was 18 years of age; his brother was 30 years of age; they worked in a carwash; and the money found in his brother's possession

belonged to his brother.

Defendant contends that the State failed to prove that he aided, abetted, solicited or attempted to aid his brother in the theft, with the intent to facilitate the commission of the offense.

The foregoing summary of the evidence demonstrates that the State adduced sufficient evidence to prove, circumstantially, that defendant's brother took the complaining witness's wallet and that defendant aided in the theft and was accountable therefor (Ill. Rev. Stat. 1971, ch. 38, pars. 5-1, 5-2). The complaining witness had just been to the bank; she had cash money in her wallet; defendant and his brother "jumped in front" of her to board the bus; they held her pinned between themselves while the brother brushed against the complaining witness; the witness thereafter discovered that her wallet was missing from her previously closed handbag; defendant's brother was found with all but two dollars of the money on his person, and the other two bills, peculiarly marked in red, were found in the area of the police vehicle where he had been observed moving about with his hand. Defendant was more than merely present at the scene; by his actions of abruptly boarding the bus in front of the complaining witness and then aiding in pinning her in such position that she was unable to move while inside the bus, he assisted his brother in removing her wallet from her handbag; the evidence adduced involved him in the theft beyond a reasonable doubt. People v. Williams, 104 Ill. App. 2d 329, 244 N.E.2d 347.

The testimony of the complaining witness as to the positioning of her and the two men was not self-contradictory, as defendant argues. Such testimony concerned their respective positioning during the boarding of the bus and while at the farebox on the bus; it involved different time sequences during the incident and did not cast doubt on the weight of her testimony.

The cases cited by defendant are inapposite on their facts. See e.g., People v. Tillman, 130 Ill. App. 2d 743, 265 N.E.2d 904; People v. Womack, 73 Ill. App. 2d 317, 219 N.E.2d 592.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

(Publish abstract only.)

8/6/74.
Japan
2nd Div.

OCT 10 1974
ASSOCIATION

21 I.A.^{3D} 794

No. 59722

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	_____
)	
JAMES SIMENTAL,	)	HONORABLE
	)	DANIEL J. WHITE
Defendant-Appellant.)	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

After a bench trial, defendant was found guilty of the offense of battery and sentenced to thirty days in the House of Correction.

On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt.

Edna Weaver, the complaining witness, testified that she and her husband were in front of their home on South Union Avenue when she observed defendant in his car across the street. She then saw him coming across the street screaming and yelling. Neither she nor her husband had said anything to him. Defendant hit her husband in the back of the neck and, when her husband went upstairs to call the police, defendant turned and hit her with his fist twice in the face and once in the breast. At the time she was hit, she was holding a gallon of milk in one hand and her purse on her other arm. She did not fall to the ground as a result of the blows, but was knocked back against a wire fence. The blows caused bruises on her face, but she did not go to the doctor. On cross-examination, she stated that she did not jump on defendant's back before he hit her.

Evelyn Weaver, complainant's 13 year old daughter, testified that she was across the street when she saw defendant hit her mother twice in the face and once in the breast with his fist. She did not see defendant hit her father and did not hear her mother say anything to defendant.

* SULLIVAN, P.J., BARRETT, J. and DRUCKER, J. participating.

Defendant testified that he saw Mr. and Mrs. Weaver across the street while he was sitting on the front porch of his house on South Union Avenue. He heard Mr. and Mrs. Weaver call him a "hippie, long hair and thief." He crossed the street and asked Mr. Weaver why he had called him those names. Weaver did not respond but "took a swing" at defendant, which missed. He hit Weaver in the back of the neck, and Weaver then ran upstairs. At that time someone was on his back, and as he turned around in self-defense, his right elbow struck that person, who turned out to be Mrs. Weaver, driving her back against a fence. He denied striking her in the face and in the chest with his fist. He did not see Evelyn Weaver at the scene of the incident.

Raymond Simental, defendant's father, testified that he did not see the occurrence but did observe defendant and Mrs. Weaver across the street in front of the Weavers' house. She was screaming and hollering, "Call the police." He did not see any bruises on her face and did not observe any children in the area.

OPINION

Section 12-3(a) of the Criminal Code, Ill. Rev. Stat. 1971, ch. 38, par. 12-3 provides:

"A person commits battery if he intentionally or knowingly, without legal justification, and by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."

The complaint charged that defendant "knowingly without legal justification made physical contact of an insulting nature striking the said Etna [sic] Weaver about the face, using his fists."

Defendant points out that sec. 4-5(b) of the Criminal Code¹ provides that a person knows, or acts knowingly or with knowledge of the result of his conduct "when he is consciously aware that such result is practically certain to be caused by

¹ Ill. Rev. Stat. 1971, ch. 38, par. 4-5(b).

his conduct." He contends the evidence failed to establish beyond a reasonable doubt that he struck Mrs. Weaver in the face or breast with his fist. Alternatively, he argues there was a failure of proof that he struck her with a conscious awareness that harm was practically certain to be caused by his conduct.

He maintains that he did not strike Mrs. Weaver with his fist but rather, in his attempt to dislodge whomever was on his back, he turned and in self-defense inadvertently struck her with his right elbow, and that this action was not done "knowingly", within its statutory definition of that term. He maintains that his testimony was corroborated by that of his father, who saw no bruises on her face. He further states that Mrs. Weaver's testimony was discredited. He argues that her testimony in which she stated she did not fall from the blows she allegedly received to her face, is beyond belief in view of the fact that he is a six foot, 200 pound man and that she was standing in a position of poor balance on a porch stair, with a gallon of milk and her purse in her hands.

In a bench trial, it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony and, unless the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt, the finding of the trial court will not be disturbed. (People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378.) Also, it is well-settled that the testimony of one witness, when positive and credible, is sufficient to sustain a conviction even though contradicted by the accused. (People v. Novotny, 41 Ill.2d 401, 244 N.E.2d 182.) Here, there is positive testimony by Mrs. Weaver that defendant, without provocation, hit her twice in the face and once in the breast with his fist. This testimony was corroborated by her daughter. The trial court obviously placed greater credence on the testimony of Mrs. Weaver and her daughter and thereby indicated its disbelief of defendant and his father. The trial court was in a better position to observe the demeanor of the witnesses during

trial, and we do not believe the evidence was so unsatisfactory as to raise a reasonable doubt as to its finding of guilt.

For the reasons stated, the judgment is affirmed.

Affirmed.

ABSTRACT ONLY.

NO. 59662



3D
21 I.A. 795

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
NORMAN M. BIVENS, a/k/a	)	HONORABLE
BUDDY BIVENS,	)	JOHN J. CROWLEY,
	)	PRESIDING.
Defendant-Appellant.)	

Per Curiam: First District, Second Division
Before Hayes, P.J., Stamos and Leighton, JJ.

Defendant Norman M. Bivens, also known as Buddy Bivens, and William Miller, a co-defendant, were charged with the offense of armed robbery in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). The State, by leave of court, reduced the charge to a misdemeanor theft. In a bench trial, defendant was found guilty and sentenced to serve nine months in the House of Correction. Miller was also found guilty and sentenced to four months in the House of Correction. This appeal is by defendant only. The issues are whether the alleged intoxication of the complaining witness at the time of the incident made his testimony insufficient to prove defendant guilty beyond a reasonable doubt; and whether the trial court erred in restricting cross-examination of the complaining witness concerning his tolerance to drinking beer.

The record discloses that according to I. Miske, the complaining witness, on April 3, 1973, at approximately 7:00 P.M., he was sitting in a tavern at 1439 West Fullerton Avenue in Chicago. The defendant, a man Miske had known for about three weeks, in the company of William Miller, approached Miske about buying a beer. Miske said defendant introduced Miller to him as his brother-in-law, Billy Love. Miske said

he bought a six-pack of beer at defendant's request and defendant then suggested that they go to Miske's car to drink it. They did, and were joined in the car by Miller and a female, introduced as defendant's wife, but who later was identified as Miller's sister and defendant's girlfriend. Miske stated he needed gas and, as a result, he drove to a gasoline station at Racine and Lincoln, where he bought \$3 worth of gas and took out his billfold, which had about \$170 in it, to pay for the gas; and that defendant then remarked, "Boy, you got a billfold full of money."

Miske said he drove back to the tavern and they had a couple more beers; that defendant asked him to let defendant drive and to go for a ride in his car; that he gave defendant the keys; that defendant was in the driver's seat; that Miller was in the back seat; and that he [the witness] sat next to defendant. Miske said he was hit on the head from behind and knocked out; that the next thing he remembered was Miller and defendant dragging him out of the car; that Miller was holding his [Miske's] arms behind him and he [Miske] was trying to kick defendant, who was trying to get Miske's billfold. Miske testified he was knocked out again and, when he awoke, he was lying on the ground; that nobody was around; that his face was bruised on both sides, his chin was bruised; and that he had multiple bruises on his back. Miske said his billfold was gone, together with about \$170 in money. His driver's license, papers and pictures, State identification card, keys to the car, and his heart medicine were also missing. On cross-examination, Miske said he did not see anybody take his wallet.

Miske said the Love girl (Miller's sister and defendant's girlfriend) came to his house, returned his billfold, and asked him, if she returned the money, would he drop the charges.

Miske also said he did not drink shots with his beer because he has a heart problem; and that he had a total of four beers, including a can of beer.

Investigator Gus Wiler testified he showed Miske a series of photographs and that based on identifications by Miske, Wiler arrested Miller on April 5, 1973, and arrested defendant the next day in a tavern at 1439 West Fullerton, Chicago.

William Miller testified a man about 25 years old, later identified as Leroy Wilson, was sitting in the back seat of the car with Miller while Miske was in the front seat with defendant, who was driving; that, when the car stopped, Miske got out and Wilson began beating him; and that he and defendant got out of the car and pulled Wilson off Miske. Miller stated Miske was drunk. He also said he never took Miske's wallet and did not strike him. On cross-examination Miller said he had never told the police about Wilson being in the car. He also said that defendant was not his brother-in-law, but was going with his sister.

Defendant testified he had previously met Miske three or four times in the tavern; and that on April 3, 1973, Miske came in the tavern between 3:00 and 4:00 P.M. and sat with Leroy Wilson, drinking beer. Defendant said they went to Racine and Wilson, where Miske bought some gas, and then they went to a tavern at Belmont and Sheffield for wine, and they then returned to the tavern at 1439 West Fullerton.

Defendant further testified that Miske was drunk; that he could hardly walk; that about 9 o'clock that night the bartender told Miske "he was cut off and that he could not have any more"; that he could buy something to go, but he wouldn't serve him in the tavern; and that Miske then bought a six-pack. Defendant said they went to Miske's car and

defendant sat next to him; and that Miller was in the back seat, playing his guitar with Leroy Wilson next to Miller. Defendant testified Miske was driving and then told defendant to drive; that defendant started to drive; that Miske told defendant to stop; and that Miske then drove back to the tavern. Defendant said that, when Miske got out of the car, Wilson hit him; and that he [defendant] talked Wilson into leaving Miske alone. Defendant said he did not hit Miske and did not take anything from him.

On cross-examination defendant said he did not tell the police about Wilson. Defendant also stated Miske did not take out his wallet to pay for the gas but gave the man two silver dollars; and that, when Miske was in the tavern, he used half dollars and silver dollars to pay for the beers.

On rebuttal Miske said he did not know Leroy Wilson and that there was no fourth person in the car. Miske also stated he gave the bartender four silver dollars, but did not pay for the gas with silver dollars.

On rebuttal Wiler testified that defendant had never mentioned a fourth person being in the car. On cross-examination, Wiler said the police investigated another person, about 19 years old, to determine his involvement in the theft.

Defendant argues "that the credibility of the complaining witness' testimony was determinatively challenged by his own testimony stating how much alcohol he consumed in light of his questionable health." Defendant further argues that Miske's doubtful "recollection and clouded memory, caused by drinking and being knocked unconscious, raise grave doubt whether the defendant was proved guilty beyond a reasonable doubt."

However, other than the statements by defendant and his companion Miller that Miske was drunk, there is no evidence in the record to establish that Miske was intoxicated at the

time of the occurrence. The only positive evidence in the record as to the amount of intoxicating liquor consumed by Miske was his own admission that he drank a total of four beers. The mere fact that a witness had been drinking prior to the time of the offense to which he later testified does not give rise to the conclusion that he was intoxicated.

People v. Mason, 60 Ill. App. 2d 307, 209 N.E. 2d 863 (abst. opinion).) Further, the effect of Miske's drinking and alleged intoxication "were factors affecting the weight and credibility of the evidence." People v. Harris, 124 Ill. App. 2d 234, 239, 260 N.E. 2d 325.

The testimony of Miske was clear and convincing. It negatives the contention of defendant that Miske's "recollection and clouded memory, caused by drinking and being knocked unconscious, raise grave doubt whether the defendant was proved guilty beyond a reasonable doubt."

The case of People v. Pellegrino, 30 Ill. 2d 331, 196 N.E. 2d 670, cited by defendant in support of the contention that the complaining witness' intoxication rendered his testimony doubtful, is not in point. In Pellegrino, the witness, at the time of the incident, was in the fourth week of a seven-week period of drunkenness. This state of intoxication had an effect upon her to such a degree that at the time of the occurrence she was unable to walk five feet without holding onto the wall and was unable to recognize a party over three feet from her who was aiding an injured person. Clearly, no such degree of intoxication appears here as to Miske.

Defendant also argues that it was error for the trial court to restrict the cross-examination of Miske concerning his tolerance to drinking beer. The law is clear that the latitude allowed in cross-examining a witness rests within the discretion of the trial court (People v. Clark, 96 Ill.

App. 2d 247, 238 N.E. 2d 220); and that it is only in the case of a clear abuse of discretion resulting in manifest prejudice to the defendant that a reviewing court will interfere with the trial court's decision. People v. Jackson, 76 Ill. App. 2d 432, 223 N.E. 2d 401; People v. Nugara, 39 Ill. 2d 482, 236 N.E. 2d 693, cert. denied 393 U.S. 925.

In the case at bar the trial court was informed of Miske's general physical and medical condition, the amount of beer he had consumed and the period of time over which the consumption took place. Under such circumstances, the trial court did not abuse its discretion in not permitting counsel for defendant to interrogate Miske as to his tolerance for and reaction to alcohol, even though he testified that he was unaccustomed to drinking beer and that he suffered from a heart condition requiring prescription medication.

Defendant further argues that there is no evidence in the record "relative to how, where or by whom his [Miske] money was taken, if in fact there was any money to be taken." On the contrary, Miske testified, without contradiction, that the Love girl [defendant's girlfriend] came to Miske's house, returned his billfold, and asked him, if she returned the money, would he drop the charges. This evidence raises a strong inference that defendant took Miske's billfold and money.

Defendant also states that the evidence shows the attack on Miske was made by Leroy Wilson and not by defendant. The attempt of defendant and his co-defendant Miller to place the blame for the theft on Leroy Wilson appears to be an afterthought, contrived by them for the purpose of relieving themselves of their criminal responsibility. Neither defendant nor Miller ever told the police that it was Leroy Wilson who attacked Miske and committed the theft. Further, Miske

testified that he did not know Leroy Wilson and that there was no fourth person in the car.

The judgment of the trial court depends upon the credibility of the witnesses. In a bench trial, it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony and, unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. (People v. Bracey, 129 Ill. App. 2d 57, 262 N.E. 2d 748; People v. Catlett, 48 Ill. 2d 56, 268 N.E. 2d 378; People v. Simental, 11 Ill. App. 3d 537, 297 N.E. 2d 356.) The trial court was in a better position to observe the demeanor of the witnesses during the trial, and found defendant guilty of the offense of theft. The evidence was adequate to support the decision of the trial court and, therefore, the court should not disturb its judgment.

The numerous cases cited by defendant set forth the general principles of law but are inapposite to the facts in the case at bar.

The judgment of the trial court is affirmed.

Affirmed.

Publish abstract only.

5.13.14
Zapin
2nd Div

59548



3D
21 I.A. 820

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
)
v.)
)
)
LARRY WILLIAMS,)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
ROBERT L. MASSEY,
JUDGE PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendant was charged with the offense of rape in violation of section 11-1 of the Criminal Code and also with the offense of armed robbery in violation of section 18-2 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, pars. 11-1, 18-2.) After a bench trial, the defendant was found guilty of rape but not guilty of armed robbery and was sentenced to serve a term of not less than five years or more than eight years in the Illinois State Penitentiary.

Defendant appeals arguing that the evidence was insufficient to establish his guilt of rape beyond a reasonable doubt; and that the Illinois Rape Statute is unconstitutional in that it discriminates against males in violation of the Equal Protection Clause of the fourteenth amendment of the United States Constitution and article I, section 18 of the Illinois Constitution of 1970.

At the trial, Jennie Newson, the complaining witness, testified that she was married but not living with her husband and that she was 40 years of age. She said that at approximately 6:15 A. M. on May 31, 1972, she was on her way home from

* BARRETT, DRUCKER AND LORENZ, JJ.
participating

a restaurant located at 47th and Woodlawn, Chicago, Illinois, when she was accosted by a male person who, at knife point, forced her into a gangway and then into a basement area located at 4605 Woodlawn, Chicago, Illinois. Mrs. Newson identified the defendant in open court as the person who accosted her. She said that the defendant took her purse, dumped everything out and then partially removed her lower clothing. Mrs. Newson further stated that the defendant, while still holding the knife at her side, inserted his penis into her vagina. He did not reach a climax because the police arrived and he got up. Mrs. Newson testified that first two white police officers came and shortly thereafter a black police officer arrived. At first she did not say anything because she was afraid. The black police officer kicked her on the leg after which she said "He raped me, he raped me." She said that at no time did she ever give the defendant permission to have sexual intercourse with her. She further testified that after the incident the police took her to a doctor who examined her.

On cross-examination Mrs. Newson testified that prior to going to the restaurant she had been out with her boyfriend and had a couple of drinks with him.

Mrs. Newson stated that during the incident she was afraid to scream. She did not attempt to fight with the defendant nor did she try to run. She did not try to push the knife out of the defendant's hand and she did not cry out. She did not try to push the defendant off of her. Mrs. Newson stated that she had never spoken to an assistant state's attorney about the case but she did talk to the arresting police officers on May 31, 1972 and told them that the defendant had raped her.

On redirect examination Mrs. Newson stated that she did not try to knock the knife out of the defendant's hand and that she did not scream at any time, nor did she run at any time because she was afraid.

Robert Brown, a police officer for the city of Chicago, testified that on the morning of May 31, 1972, he and his partner, Edwin Budz, were in a marked patrol car when they received a radio call of a possible rape at 4605-4609 Woodlawn, Chicago. When they arrived at that address both officers went through a gangway to the back of the building. Through a basement window he saw a woman half lying and half sitting on the floor of the basement and saw a male negro. He went down into the basement and saw the lady sitting on the floor with the defendant facing her and walking backwards towards him. The defendant turned and started towards him. Defendant was pulling up his pants and his penis was exposed. The lady was disrobed from the waist down. Budz searched the defendant and found a red handled knife in the right front pocket of defendant's pants. At the trial Brown identified the knife as being the same knife recovered from the defendant on May 31, 1972, because his initials "R.B.," which he had placed on the knife, were there.

Brown further testified that a black police officer by the name of Coffey arrived on the scene. Coffey went over to Mrs. Newson and shook her leg. She then said "He raped me." Brown also testified that Mrs. Newson's purse was lying open on the floor of the basement with the contents thereof scattered about the floor. Brown stated that they took Mrs. Newson to a doctor for examination.

Officer Edwin Budz, at the time and place involved working with Officer Brown, substantially corroborated the testimony of Brown. Budz also testified that Mrs. Newson appeared to be in a state of shock when he first arrived at the scene. When Officer Coffey arrived on the scene he went over to Mrs. Newson. At first Coffey could not get any response from her. He tried to shake her but she appeared to be asleep. After a couple of seconds she woke up and she then said "He raped me, he raped me."

Budz said they took Mrs. Newson to the hospital for an examination. Afterwards they transported her to the station where they spoke to Mrs. Newson about the incident.

It was stipulated that if Evidence Technician Leisz were called to testify he would state that on May 31, 1972 he took two vaginal smears of Jennie Newson and that they were transported by him to the Chicago Police Crime Laboratory for examination. It was also stipulated that if Marian Mahan were called to testify she would state that she was employed at the Chicago Police Crime Laboratory as a microanalyst. She had occasion to examine the smear specimens taken of Mrs. Newson and that they proved to be negative for spermatozoa. It was further stipulated that the physical examination of Jennie Newson, a married woman forty years of age, showed no vaginal trauma. It was further stipulated that the defendant was then 20 years of age.

No evidence was presented on behalf of the defendant.

Opinion

The defendant contends that the evidence was insufficient to establish his guilt of rape beyond a reasonable doubt. In

rape cases, the courts of review are charged with a special duty to carefully examine the evidence. (People v. Qualls, 21 Ill.2d 252, 171 N.E.2d 612.) However, in such an examination courts of review must be careful not to encroach upon the function of the trier of fact to weigh the credibility and otherwise assess the evidence presented at trial. (People v. Springs, 51 Ill.2d 418, 283 N.E.2d 225.) The trial court's finding will not be reversed on appeal unless the evidence is so unsatisfactory as to create a reasonable doubt of defendant's guilt. (People v. Scott, 4 Ill.App.3d 279, 280 N.E.2d 715.) The testimony of the complaining witness alone, if positive and credible, is sufficient to sustain a conviction of rape even though contradicted by the accused. People v. Davis, 10 Ill.2d 430, 140 N.E.2d 675; People v. Lilly, 9 Ill.App.3d 46, 291 N.E.2d 207; People v. Wright, 3 Ill.App.3d 829, 279 N.E.2d 398.

In the case at bar, the testimony of Jennie Newson was positive and credible. She testified that on May 31, 1972, she was returning from a restaurant when she was accosted by the defendant. He forced her into a basement where he disrobed her from the waist down and inserted his penis into her vagina. He did not reach a climax because while he was still on top of her the police arrived on the scene.

The defendant argues that Mrs. Newson did not make a spontaneous complaint that she had been raped. However, the record discloses that when the police arrived Mrs. Newson was in a state of shock. Through the efforts of a police officer she was aroused out of her state of shock and she then shouted "He raped me, he raped me." This evidence clearly refutes the defendant's argument that complainant did not make a spontaneous complaint of rape.

The defendant also argues that the State's testimony was not clear and convincing and implies that Mrs. Newson consented to the act of sexual intercourse. However, the uncontradicted testimony is that the defendant, at knife point, disrobed Mrs. Newson from her waist down and forced her to have sexual intercourse with him. Further, when the police arrived in the basement room the defendant was pulling up his pants and his penis was exposed. The defendant's implication that Mrs. Newson consented to the act of intercourse has no basis of fact.

The defendant also argues that the medical evidence does not indicate that Mrs. Newson was forcibly raped. The defendant argues that the medical report fails to show any indication of vaginal irritation. The report does not contain the words "vaginal irritation" but rather states that there was no indication of "vaginal trauma" because the evidence shows that the complainant was a married woman and forty years of age. The record also shows that the defendant did not reach a climax and that the smears proved negative for spermatozoa. However, the law is clear that where the testimony of the complainant is found to be clear and convincing, as in the case at bar, it is not necessary that it be corroborated by medical testimony in order to warrant or sustain a conviction for rape. (People v. Wright, 3 Ill.App.3d 829, 279 N.E.2d 398.) Furthermore, the lack of spermatozoa on the smears does not indicate the lack of sexual intercourse because rape occurs when there is any penetration, however slight, of the male organ into the female organ. (People v. Washington, 70 Ill.App.2d 452, 217 N.E.2d 356; People v. Polk, 10 Ill.App.3d 408, 294 N.E.2d 113.) Here, the uncontradicted evidence that the defendant inserted his penis into the vagina of Mrs. Newson against her will and without her consent is sufficient to sustain the conviction for rape.

The defendant also argues that the Illinois Rape Statute (Ill. Rev. Stat. 1971, ch. 38, par. 11-1), is unconstitutional in that it discriminates against males in violation of the Equal Protection Clause of the fourteenth amendment of the United States Constitution and article I, section 18 of the Illinois Constitution of 1970. However, the record fails to disclose that the defendant raised this issue in the trial court.

In People v. Reese, 14 Ill.App.3d 1049, 303 N.E.2d 814, the defendant was convicted of rape. On appeal, defendant sought to argue that the rape statute was unconstitutional because it discriminated against males. The defendant did not raise this argument in the trial court. In rejecting the defendant's contention, the court said at page 1055:

"Concerning the question of the constitutionality of the applicable statute, we have examined the entire record and find this issue was not raised in the trial court and is being raised here for the first time. Since this is the first point at which the constitutionality issue has been raised, we will not consider the question here. People v. Amerman, 50 Ill.2d 196, 279 N.E.2d 353; People v. Eubank, 46 Ill.2d 383, 263 N.E.2d 869."

Also see People v. Jones, No. 58258, May Term, 1974.

In the case at bar, the defendant did not raise the constitutionality of the Illinois Rape Statute in the trial court and, therefore, he may not raise the argument for the first time on appeal.

After seeing and hearing the witnesses, the trial court ruled that the defendant's guilt had been established beyond a reasonable doubt. From a review of the entire record, it

cannot be said that the determination of the trial court was erroneous. People v. Catlett, 48 Ill.2d 56, 268 N.E. 2d 378.

The judgment of the trial court is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.

No. 59880

HARRY MANUSHAW,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	
)	
CHECKER TAXI COMPANY, INC.)	
and ARTHUR E. MURPHY,	)	HONORABLE
	)	WILLIAM F. PATTERSON
Defendant-Appellant.)		PRESIDING

PER CURIAM* (First District, Fifth Division):

Plaintiff commenced an action on August 6, 1970, against Checker Taxi Company, Inc. (Checker) and Arthur E. Murphy (Murphy) for personal injuries allegedly sustained in an automobile accident. That action was dismissed on October 12, 1971, for plaintiff's failure to comply with an order of July 21, 1971, to execute an authorization to the Internal Revenue Service for the production of income tax returns. On February 20, 1972, plaintiff filed a petition pursuant to section 72 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 72) for the vacation of that dismissal. The petition was subsequently sustained as to both defendants and the plaintiff's action was reinstated. Checker alone prosecutes this appeal, contending that plaintiff's section 72 petition failed to state sufficient grounds for relief; that it was defective in certain respects; and that the dismissal of the suit was due to plaintiff's own neglect and lack of diligence.

The original complaint alleged, inter alia, that on August 8, 1968, while plaintiff was a passenger in a taxicab owned by Checker, a collision occurred at a Chicago intersection between the taxicab and an automobile operated by Murphy, and plaintiff was injured as a result. The separate answers of the defendants consisted of denials of the material portions of the complaint. Defendants also served interrogatories and filed notices of depositions upon plaintiff. On October 22, 1970, pursuant to a motion

* SULLIVAN, P.J., BARRETT, J. and DRUCKER, J. participating.

by Checker to dismiss the complaint for failure of plaintiff to answer the interrogatories, plaintiff was ordered to and did file his answers within 28 days.

On July 21, 1971, Checker secured an order upon plaintiff that the latter execute within 28 days an authorization to the Internal Revenue Service to permit Checker's counsel access to plaintiff's 1967-1969 federal income tax returns. A compliance date for the order was set for October 12, 1971.

After a failure by plaintiff to comply with the order seeking authorization, an order was entered on October 12, 1971, dismissing the personal injury action. The order read as follows:

"Now come the defendants and move the Court to dismiss this cause for failure of plaintiff to comply with previous order, and the Court being fully advised in the premises, sustained said motion and thereupon it is ordered by the Court that the Statement of Claim be and the same is hereby ordered stricken and that this suit be and the same is hereby dismissed.

An explanatory note was added by the clerk of the court, as follows:

"NOTE: THE ABOVE ORDER IS AN AMPLIFICATION OF A MEMORANDUM OF ORDER APPEARING ON HALF-SHEET. LINES WERE DRAWN THROUGH SAID MEMORANDUM. A PHOTOCOPY OF SAID HALF-SHEET IS INCLUDED IN THE RECORD PURSUANT TO ADDITIONAL PRAECIPE FOR RECORD FILED BY PLAINTIFF."

Plaintiff's section 72 petition, executed and verified by plaintiff's counsel, was filed on February 20, 1973, requesting that the order of dismissal of October 12, 1971, be vacated. The petition is summarized as follows: Checker had secured an order upon plaintiff "to produce" his 1967-1969 income tax returns, which circumstance was communicated to plaintiff, a Florida resident. The returns were not immediately available to plaintiff, but application was made to procure them. In September, 1971, plaintiff's deposition was set for October 15, 1971, and plaintiff was so advised in writing by his counsel. On October 1, 1971, plaintiff's counsel spoke to "an attorney" in the office of Checker's counsel concerning settlement of the case, and he was reminded

by its counsel that the tax returns had not been produced and that a deposition of plaintiff was set for October 15. After this conversation, plaintiff's counsel advised plaintiff by letter relative to those matters, and on October 8, 1971, he received a written reply to his September letter, in which plaintiff reported he was still in the process of securing the tax returns but would be unable to come to Chicago for the deposition. On October 11, 1971, plaintiff's counsel notified Checker's counsel of the delay in the receipt of tax returns and the latter indicated an understanding that plaintiff's residency in Florida could slow a response to the request for the tax returns. On October 12, 1971, unknown to plaintiff or his counsel, Checker obtained a dismissal of the action. This dismissal order was later lined out on the half-sheet, the record of the clerk of the court. On October 13, 1971, plaintiff's counsel again wrote to plaintiff seeking compliance with the request for the tax returns. On November 15, 1971, he wrote to plaintiff seeking advice as to a suitable date for a deposition. On December 4, 1971, plaintiff mailed to his counsel the requested tax returns and W-2 forms, which were forwarded to Checker's counsel four days later. The petition also asserted that "routine checks made of the court's file by plaintiff's counsel did not alert counsel that the case was dismissed because the order of October 12, 1971, being lined out did not attract attention" and because the file was also missing from its regular place for several months during 1972. It is also asserted that in May, 1972, Checker's counsel received notice of Murphy's motion for the immediate deposition of plaintiff; that Checker's counsel did not give notice at that time that the case had been dismissed; that Murphy's counsel did not know that the case had been dismissed, and plaintiff did not learn of the dismissal until February 16, 1973, when his counsel appeared for the purpose of having the case set for trial. No documents or other affidavits were filed in support of the petition.

35888

Checker filed an answer to the section 72 petition, supported by certain exhibits¹. The answer alleged that the July 21, 1971 order concerning the tax authorization was mailed to plaintiff's counsel together with a form of authorization; that plaintiff was neither required nor requested to produce the tax returns, but was merely to execute the authorization form supplied; that the deposition set for October 15, 1971 was scheduled on July 1, 1971 and was not scheduled in September, 1971, as alleged in the petition; that Checker's counsel did not speak to plaintiff's counsel on October 11, 1971, concerning the tax returns and the forthcoming deposition; that Checker was unaware of the defacement of the October 12, 1971 half-sheet notation until after the filing of the section 72 petition; that Checker's counsel never received tax returns or W-2 forms from plaintiff; that Murphy's notice of deposition in May, 1972 imposed no requirement upon Checker since the suit against them had been dismissed; and the record disclosed that the dismissal of the action was the result of the failure of plaintiff and his counsel to comply with the court's orders.

Plaintiff's action was reinstated as to Murphy by order of May 22, 1973 and as to Checker by an order of October 4, 1973, which reads as follows: "[i]t is ordered by the Court that the motion to vacate the dismissal order be and the same is hereby sustained." Checker appeals from this order, although no appeal has been taken by Murphy.

OPINION

A petition under section 72, although filed in the original proceeding, is not a continuation thereof, but is treated as a new action. It is subject to the same rules of pleading as any

1

A letter of July 21, 1971, sent to plaintiff's counsel informing him of the order compelling plaintiff to execute an authorization to the Internal Revenue Service to permit defendant's counsel to examine plaintiff's returns for the years 1967, 1968, 1969; a copy of said authorization; and a letter of July 1, 1971 granting plaintiff a continuance to October 15, 1971 for the taking of his deposition.

other action, and therefore the petition must state adequate grounds for relief. Mutual Nat. Bank of Chicago v. Kedzierski, 92 Ill.App.2d 456, 236 N.E.2d 336.

Here, the contentions raised by Checker that plaintiff has failed to demonstrate sufficient grounds for relief under section 72 and that the dismissal of his action was the result of his own neglect and lack of diligence, we believe are well taken.

Plaintiff was initially served with notice of motion and a copy of a blank form authorization to the Internal Revenue Service and was subsequently served with a copy of the July 21, 1971 order requiring the execution of the authorization. There appears to be no question that plaintiff was not required to produce his tax returns by that order. Therefore, we think plaintiff's argument that his out-of-state residency caused the delay in supplying the tax returns is without merit. Moreover, plaintiff advances no other ground or explanation for his failure to execute the required authorization within the time set by the order. He undeniably received notice of the July 21, 1971 order which set the date for his compliance on October 12, 1971, the date of dismissal. His argument that the order requiring the tax authorization was ambiguous, because it indicated two separate dates for compliance, is unacceptable inasmuch as the order of dismissal was not entered until the later of those two dates.

To entitle plaintiff to relief under section 72, it is necessary that he demonstrate that the dismissal order was not entered because of his lack of due diligence and that he was not culpable in the delay of sixteen months in the presentation of his petition for relief to the court. Section 72 was not intended to relieve a party of the consequences of his own neglect or mistake. Brockmeyer v. Duncan, 18 Ill.2d 502, 165 N.E.2d 294; Goldman v. Checker Taxi Company, Inc., 84 Ill.App.2d 318, 228 N.E.2d 177.

Here, plaintiff in the original action failed to comply with defendant's request for an authorization for the reproduction of his tax returns as required by court order. Plaintiff had a total of 83 days in which to sign the authorization which had been transmitted to him by defendant, and no reason is given in the section 72 petition for his failure to do so. Consequently, the absence in the 72 petition of any justification either for plaintiff's initial inaction or any indication that the dismissal order was entered for some reason other than his lack of diligence left an insufficient basis to properly vacate the dismissal.

Kukuk v. Checker Taxi Co., 13 Ill.App.3d 5, 299 N.E.2d 468.

Furthermore, the record also discloses a lapse of sixteen months between the entry of the order of dismissal on October 12, 1971 and the filing of the instant section 72 petition on February 20, 1973. The petition alleges that plaintiff had conducted "routine checks" of the court file in the case, but that the line superimposed upon the order of dismissal on the half-sheet failed to place him on notice of the order of dismissal. We note, however, that the record contains a certified amplified order showing a dismissal. The memorandum order of dismissal, upon which the amplified order is based, has been lined through. Plaintiff has offered no explanation as to the entry of such an amplified order, and the record fails to disclose any information as to whether plaintiff's counsel knew of and possibly relied on a practice of the clerk to make corrections by drawing lines through mistaken entries such as occurred here. Thus, in the absence of any such explanation, it appears to us that plaintiff failed to demonstrate that in relying on the line drawn through the dismissal order, he acted with the required diligence in the presentation of his section 72 petition. (See Goldman v. Checker Taxi Company, Inc., *supra*.)

The case of Vosnos v. Wenzel, 44 Ill.App.2d 192, 194 N.E.2d 484, cited by plaintiff concerning the existence of a clerical error as giving rise to grounds for relief under section 72, is

not in point. In Vosnos, the clerk of the trial court had misnoted the case with regard to its jury or non-jury status, and the court on review held that the injured party was truly misled thereby because of the difference in courtroom assignments. In the instant case, neither the lining out of the notation of the dismissal order or the entry of the instant dismissal order itself can be classed as clerical errors which could have misled plaintiff.

Plaintiff also relies upon the allegation in his section 72 petition that his attorney spoke to counsel for Checker in early October, 1971, and informed the latter of the plaintiff's situation concerning the forthcoming deposition date and with regard to the difficulty in procuring the tax returns. He argues from that premise that his reliance on the "agreement" resulting between counsel from that conversation relative to those matters was a sufficient showing of due diligence to justify vacation of the dismissal and cites the case of Smith v. Pappas, 112 Ill. App.2d 129, 251 N.E.2d 390, in support. Smith is authority for the fact that the allegation of an agreement between counsel is sufficient to state a ground for relief under section 72. There was no denial of the agreement in Smith. However, in the instant case, the affidavit of Checker's counsel not only denies any such "agreement" but also specifically denies the conversation in early October, 1971, alleged by plaintiff as basis for the "agreement". It is noted plaintiff does not assert that Checker's counsel agreed in the alleged conversation to accept the tax returns in lieu of the authorization. If this had been asserted, we think that under Smith a factual question would have been raised as to whether there was such an agreement. In the absence of some such understanding, we believe that there is no basis in the record of any agreement.

In view of the foregoing, and after further review of the record, we are of the belief that plaintiff has failed

to establish due diligence in the presentation of his petition more than 16 months after the entry of the dismissal order. We have heretofore stated our belief that the record does not disclose that plaintiff acted with due diligence in his failure to sign the tax authorizations within the initial 83 day period prior to the date of dismissal.

In view thereof, we conclude that there was insufficient basis upon which the trial court could properly vacate the dismissal order, and said order of October 12, 1971, vacating dismissal of this cause, is reversed and the cause is remanded with directions to deny plaintiff's section 72 petition.

Reversed and remanded with directions.

ABSTRACT ONLY.

RICHARD J. DALEY, Mayor and
Local Liquor Control Com-
missioner of the City of
Chicago,

Plaintiff-Appellee,

v.

HARLAND E. FERGUSON, Licensee,
LICENSE APPEAL COMMISSION and
A. L. CRONIN, Chairman,

Defendants-Appellants.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
F. EMMETT MORRISSEY,
JUDGE PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendants appeal from the judgment of the circuit court of Cook County reversing an order of the License Appeal Commission which in turn reversed an order of the Local Liquor Control Commissioner of the City of Chicago revoking defendant's liquor license on the ground that the licensee, through his agents, allowed solicitation for the purposes of prostitution.

At the hearing before the Commissioner, Chicago police officer Robert O'Donnell testified that on January 13, 1971, he and his partner, Officer Sokolnicki, investigated the lounge at 3926 N. Broadway, Chicago, Illinois. At approximately 9:00 P.M., both officers entered the lounge, sat down at the middle of the bar and ordered a drink. Officer O'Donnell testified that he asked the bartender, George Ursul, whether there was a woman in the place a guy could have a good time with. After O'Donnell had several drinks, Ursul told him that the girl sitting down the bar was a playgirl, if he didn't mind playgirls. Ursul asked if O'Donnell would like to meet her and O'Donnell replied that he would. Ursul then brought Rita Williams over to O'Donnell and introduced them. O'Donnell

* BARRETT, DRUCKER AND LORENZ, JJ.
participating

testified that he bought Williams a drink and in the ensuing conversation she agreed to perform an act of prostitution for \$20. O'Donnell asked her about his friend, referring to Officer Sokolnicki, and Williams agreed to take care of him for another \$20. During this conversation, Ursul was serving them drinks. At the conclusion of the conversation with Williams, O'Donnell told Ursul of the arrangements he had made with Williams. Ursul told him that he was glad to see that he had scored. In response to a question by O'Donnell, Ursul stated that Williams was all right. O'Donnell testified that he then bought a drink for Ursul and Williams. Williams, O'Donnell and Sokolnicki then left the lounge. As they approached the car, Williams said that she would have to get money in front. Officers O'Donnell and Sokolnicki each gave Williams \$20. At that time the officers announced their office and placed Williams under arrest. They then returned to the lounge and placed Ursul under arrest.

Officer David Sokolnicki testified that on January 13, 1971, he and his partner, Officer O'Donnell, made an investigation of the lounge at 3926 N. Broadway, Chicago, Illinois. At approximately 9:00 P.M., they entered the lounge and sat down at the bar. O'Donnell then had a conversation with the bartender, George Ursul. Shortly thereafter, Rita Williams sat down next to O'Donnell and they had a conversation. O'Donnell then was asked if he wanted to participate in sex for \$20 and he replied that he did. They then ordered another round of drinks and O'Donnell had another conversation with the bartender, Ursul. Williams, O'Donnell and Sokolnicki then left the lounge. As they got to their car, Williams asked for \$20 apiece to perform an act of prostitution. O'Donnell and Sokolnicki each gave Williams \$20. They then placed Williams under arrest. The bartender, Ursul, was also placed under arrest.

Chicago Police Officer Andrew Murcia testified that on March 5, 1971, he and his partner, Officer Prueser, made an investigation of the lounge at 3926 N. Broadway, Chicago, Illinois. At 11:30 P.M., they entered the lounge and ordered a drink. Officer Murcia asked the bartender, Willie Boltin, if his name was Bill. Boltin replied that it was and asked if Murcia's name was Andy. When Murcia responded that it was, Boltin then stated that he had received a phone call from Joe saying that Andy was coming over for a girl. Boltin told him to wait around a while because the girl who would perform an act of prostitution with him was Bonnie, a barmaid in the lounge, and she was busy with other customers. Boltin also informed him that it would cost him \$100. Boltin brought Bonnie over and introduced her to Officer Murcia. Officer Murcia then gave Boltin \$100. Boltin asked for \$10 for himself and Officer Murcia complied with his request. At approximately 12:45 A.M., Boltin came over and told Officer Murcia that Bonnie was going to leave first and Officer Murcia should follow her out when she left. Officer Murcia testified that he followed Bonnie next door and was admitted to her apartment. At that time she disrobed. Officer Murcia testified that he then admitted his partner, Officer Prueser, to the apartment and they placed Bonnie under arrest. They then returned to the lounge and placed Willie Boltin under arrest.

Chicago Police Officer Ronald Prueser testified that on March 5, 1971, he and his partner, Officer Murcia, made an investigation of the lounge at 3926 N. Broadway, Chicago, Illinois. At approximately 11:30 P.M., they entered the lounge and sat down at the bar. Officer Murcia had a conversation

with the bartender, Willie Boltin, about Bonnie, a barmaid in the establishment. Boltin informed Murcia that it was going to cost \$100 to have sex with Bonnie. Officer Murcia handed the bartender a sum of money. Officer Prueser testified that he then followed Bonnie and Officer Murcia out of the lounge to the third floor apartment of the building next door. A short time later, Officer Murcia allowed him to enter the apartment and they placed Bonnie under arrest. They then returned to the lounge and placed Willie Boltin under arrest.

Harland E. Ferguson testified that he is the licensee of the lounge at 3926 N. Broadway, Chicago, Illinois. His brother-in-law, Bill Boltin, and George Ursul are both employed by him. He testified that he was not present in the lounge on January 13, 1971, or March 5, 1971, and had no knowledge of what had occurred.

At the conclusion of the hearing, the Local Liquor Control Commissioner found:

- "1. That on January 13, 1971, the licensee, by and through his agent, GEORGE J. URSUL, bartender on the licensed premises, steered police officers on said premises for purposes of prostitution, contrary to the Ordinances of the City of Chicago, Statutes of the State of Illinois and Rules of the Illinois Liquor Control Commission.
2. That on January 13, 1971, the licensee, by and through his agent, GEORGE J. URSUL, bartender on the licensed premises, permitted RITA L. WILLIAMS, to solicit police officers for purposes of prostitution while in the subject premises, contrary to the Ordinances of the City of Chicago, Statutes of the State of Illinois and Rules of the Illinois Liquor Control Commission.
3. That on March 5, 1971, the licensee, HARLAND E. FERGUSON, by and through his agent, WILLIE BOLTIN, bartender on said premises, steered police officers on the licensed premises for prostitution, contrary to the Ordinances of the City of Chicago, Statutes of the State of Illinois and Rules of the Illinois Liquor Control Commission."

Defendant appealed the finding of the Commissioner to the License Appeal Commission, which reversed the finding on the basis that the finding was "not supported by substantial evidence in light of the whole record."

Plaintiff filed an action in the circuit court of Cook County under the Administrative Review Act. The court found that the determination of the Illinois Liquor Control Commissioner was supported by the evidence and reversed the order of the License Appeal Commission.

Opinion

On appeal, defendant argues that the facts adduced before the Liquor Control Commissioner were insufficient to provide a basis upon which his liquor license could be revoked and that the facts showed only a private solicitation by patrons between themselves which occurred without the knowledge of the licensee. In Nechi v. Daley, 40 Ill.App.2d 326, 188 N.E.2d 243, the court stated the rule regarding review of an administrative agency:

"Under the Administrative Review Act the findings and conclusions of the administrative agency on questions of fact are to be held prima facie true and correct. (Ill. Rev. Stats. 1961, c. 110, §274.) The law in Illinois is well settled that the scope of judicial review is limited to a consideration of the record to determine if the findings and orders of the administrative agency are against the manifest weight of the evidence, and it has been consistently held that the courts are not authorized to reweigh the evidence or to make an independent determination of the facts."

See also Sarytchoff v. License Appeal Comm., 11 Ill.App.3d 735, 297 N.E.2d 646.

In the case at bar, two separate solicitations were established, either of which was sufficient to provide a basis for the revocation of defendant's liquor license. The facts adduced at the hearing before the Liquor Control Commissioner demonstrated that on both occasions the bartender took an active role in the solicitation by introducing the police officer to the prostitute. On one of the two occasions the bartender himself accepted the money for the prostitute. The testimony of Chicago Police Officers O'Donnell and Sokolnicki established that on January 13, 1971 they entered the defendant's lounge. O'Donnell asked the bartender, Ursul, about getting a woman. Ursul identified Rita Williams as a playgirl and introduced her to O'Donnell. Williams agreed to perform an act of sexual intercourse for a fee of \$20. Thereafter, O'Donnell informed Ursul of the arrangements he had made with Williams and Ursul said that he was glad to see that O'Donnell had scored. O'Donnell also asked Ursul if Williams was okay and Ursul replied that she was. The testimony of O'Donnell and Sokolnicki was sufficient to establish that Ursul aided in the solicitation of O'Donnell for the purpose of prostitution. Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill.App.2d 264, 254 N.E.2d 814; Daley v. Batitsas, No. 58943, May Term, 1974.

Similarly, the testimony of Chicago Police Officers Murcia and Prueser established that on March 5, 1971 they entered the defendant's lounge. Officer Murcia had a conversation with the bartender, Willie Boltin, who agreed to get Murcia a girl for prostitution for a fee of \$100. Thereafter, Boltin introduced Murcia to a girl and accepted \$100 for the girl and \$10 for himself. Officer Murcia testified that Boltin then instructed Murcia to follow the girl next door where she disrobed and was placed under arrest. Again, this evidence was sufficient to show that Boltin, the defendant's employee, aided in

the solicitation of Murcia for purposes of prostitution.

Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill.App.2d 264,
254 N.E.2d 814; Daley v. Batitsas, No. 58943, May Term, 1974.

The licensee, Harland Ferguson, in his testimony admitted that both George Ursul and Willie Boltin were his employees. A liquor licensee is responsible for the actions of his agents. (Ill. Rev. Stat. 1971, ch. 43, par. 185.) The evidence adduced at the hearing before the commissioner was clearly sufficient to support the license revocation.

The judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.

73-215

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
August 28, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 15th
THURMAN L. HOLT,	)	Judicial Circuit,
	)	Lee County, Illinois.
Defendant-Appellant.)	

FILED
AUG 9 1974
LORRAINE STROTZ, Clerk pro tem
Appellate Court, 2nd District

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant appeals from his conviction in a bench trial of violating Section 15-111 of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 15-111(a)) in that he operated a vehicle the weight of whose rear tandem axle exceeded by 3,520 pounds the maximum weight of 32,000 pounds permitted by law. The trial court fined him \$211.20. He contends he was not found guilty beyond a reasonable doubt.

The only witness for the State was Mr. Robert Bradley, the truck weight inspector for the State of Illinois, who weighed the truck and found it overweight. The vehicle which was owned and operated by the defendant was a tractor-semi-trailer. When the truck was weighed the front steering axle of the tractor showed a weight of 9,260 pounds, the rear axle of the tractor--12,200 pounds, and the rear tandem axle of the trailer--35,520 pounds. The scale had been tested for accuracy shortly before and shortly after, as shown by both Reports of Scale Tests which were received in evidence without objection as was the State Police Weight Station record showing the automatic print-out of the weight on each axle.

The defendant testified that while he has no scales and did not weigh the trailer or any of its contents at any time or have them weighed, (1) the factory stamped weight of the trailer is stated on its side to be 11,900 pounds, (2) The "approximate shipping weight" of the 850 Hydra-Leveling Loader Crawler-Tractor placed in the rear of the trailer directly over the rear trailer axle, is stated in the specifications which are issued by the manufacturer to be 19,465 pounds, (3) a half-ton pickup truck weighing 4,200 pounds and a small tractor weighing 2,200 pounds, were in the front part of the trailer. Defendant offered no other proof.

The trial court found the defendant guilty and assessed a fine of \$211.20. This appeal followed.

Section 15-111(a) of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 15-111(a)) provides, in referring to the rear tandem axle, that "the gross weight transmitted to the road surface * * * shall not exceed 32,000 pounds * * * ".

The only testimony offered here as to the gross weight so transmitted to the road surface at the rear tandem axle was that offered by the State's witness. The defendant's vehicle and its axles were weighed on a certified scale under proper procedure and showed defendant overweight at the rear tandem axle. The weight ticket was admitted in evidence without objection and established a prima facie case of defendant's guilty of operation of an overweight vehicle. See People v. Freehill (1970), 129 Ill. App. 2d 234, 238;

People v. Niven (1970), 130 Ill. App. 2d 463, 468.

The defendant offered no testimony whatsoever as to the gross weight transmitted to the road surface at the rear tandem axle. At best, all that his testimony showed (even if the "approximate shipping weight" of 19,465 pounds of the Crawler-Loader-Tractor inside the trailer and the weight of the other contents of the trailer were taken to be true at the time of weighing) is an aggregate weight of trailer and contents of 37,765 pounds. Defendant offered no testimony that the vehicle and its axles were weighed on other certified scales just before or just after he was given the overweight ticket. He did not produce any expert witnesses to testify to the effect of the loading of the contents in the trailer on the weight transmitted to the road surface at the rear tandem axle.

Even if it be assumed that the evidence received in this case were conflicting this court may not substitute its judgment as to defendant's guilt for that of the trier of fact. As the court said in People v. Clark (1964), 30 Ill-2d 216, 219:

"Where the cause is tried without a jury, it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony, and where the evidence is merely conflicting a reviewing court will not substitute its judgment for that of the trier of fact. (Citations.) Here, there was credible evidence fully establishing defendant's guilt * * * and, what is more, the trial court could properly consider the im-probabilities in defendant's explanation * * *."

See also People v. Novotny (1968), 41 Ill. 2d 401, 412;
People v. Taylor (1973), 8 Ill. App. 3d 727, 730-731; and
People v. Slayton (1974), 16 Ill. App. 3d 910, 913.

Therefore, we conclude that the defendant was proved guilty beyond a reasonable doubt and his conviction should stand.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.

74-171

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable GLENN K. SEIDENFELD, Justice
 Honorable L. L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

SEP 3 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

IN THE MATTER OF THE)
VILLAGE OF VILLA PARK,) Appeal from the Circuit Court
SPECIAL ASSESSMENT NO. 259) of the 18th Judicial Circuit,
(Village of Villa Park, Appellant.) DuPage County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The Village appeals from an order entered in a hearing before the court sitting without a jury reapportioning the cost of a local improvement. The assessment roll distributed the cost as 0% public benefit; the trial judge assessed the public benefit as 40% and the private benefit as 60%.

The Village contends that the objectors waived the right to contest the apportionment of the improvement; but that, in any event, the objectors' evidence was insufficient to overcome the prima facie proof made by the introduction of the assessment roll.

No answering brief has been filed by the objectors. It seems apparent to us that there are unresolved and we think difficult issues of law which could have been raised and argued by the objectors in answer to appellant's brief. But when the appellees file no brief, do not appear to support the judgment in their favor, and therefore do not oppose appellant's prayer for reversal, we believe a summary reversal is appropriate. People v. Spinelli (1967), 83 Ill.App.2d 391, 392; Metro. Investments Co. v. Enge (1973), 12 Ill. App.3d 77, 78. We therefore reverse.

Reversed.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.

UNITED STATES OF AMERICA

ate of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
Elgin, on the 3rd day of December, in the year of our
rd one thousand nine hundred and seventy-three, within and
r the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On
November 6, 1974 the Supplemental Opinion of the Court,
on the Allowance of Petition for Rehearing, was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

IN THE MATTER OF THE)
VILLAGE OF VILLA PARK,) Appeal from the Circuit
SPECIAL ASSESSMENT NO. 259) Court of the 18th Judicial
(Village of Villa Park, Appellant.)) Circuit, DuPage County.

Mr. JUSTICE SEIDENFELD delivered the Supplemental Opinion of
the Court:

No. 74-171

SUPPLEMENTAL OPINION

Leave to file a petition for rehearing was granted to the appellee-objectors who appeared here for the first time after issuance of our opinion reversing the judgment below pro forma. Upon our review of the petition for rehearing we adhere to our opinion.

THOMAS J. MORAN, P.J., and RECHENMACHER, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable GLENN K. SEIDENFELD, Justice
 Honorable L. L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
 SEP 3 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court for
v.	)	the 19th Judicial
	)	Circuit, Lake
CHARLES MILLER,	)	County, Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A ten-count indictment, all counts arising from the same offense, variously charged defendant with offenses of murder and voluntary manslaughter. After plea negotiations in which the State agreed to dismiss all but Count 8 of the indictment, defendant withdrew his plea of not guilty and pled guilty to voluntary manslaughter. Following a combined hearing on probation and aggravation and mitigation, he was sentenced to a term of 3 to 12 years.

The Appellate Defender has moved to withdraw asserting that this appeal is without merit.

The record of this case indicates that the indictment was valid having been drawn in the language of the statute (Ill. Rev. Stat. 1971, ch. 38, §9-2(a)(1); that defendant was fully admonished prior to the acceptance of his plea; that his plea was knowingly,

intelligently and voluntarily made and that all provisions of Supreme Court Rule 402 were met. (Ill. Rev. Stat. 1971, ch. 110A, §402.

Under both prior and current Illinois law (Ill Rev. Stat. 1971 , ch. 38, §9-2 and Ill. Rev. Stat. 1973, ch. 38, §1005-8-1(a)(3), respectively), the offense of voluntary manslaughter carries the penalty of 1 to 20 years imprisonment. Defendant's sentence is well within the statutory prescriptions. His minimum sentence is less than one-third the maximum, thus the provisions of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, §1005-8-1(c)(3)) do not apply. Under the circumstances of this case, defendant's sentence is not excessive.

Having reviewed all proceedings in accordance with the dictates of Anders v. California, 386 U.S. 738 (1967) , we find no error.

Motion to withdraw allowed; judgment affirmed

SEIDENFELD, RECHENMACHER, J.J. - Concur

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
AUG 2 1974

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

IN THE MATTER OF THE)
PETITION FOR THE ANNEXATION OF) Appeal from the Circuit Court of St. Clair County.
CONTIGUOUS TERRITORY TO THE)
CITY OF BELLEVILLE, ILLINOIS.) Honorable Robert L. Gagen, Judge Presiding.

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Certain residents of a subdivision known as Highridge, near Belleville, Illinois, and the St. Clair Land Company, which owned lots in the subdivision, petitioned the circuit court of St. Clair County for approval of a proposed annexation of the subdivision to the City of Belleville. The land affected by the proposal included territory within the Fairview-Caseyville Township Fire Protection District; therefore, in compliance with Illinois Revised Statutes; ch. 24, par. 7-1-1, the petitioners gave notice to the trustees of the fire protection district at least 10 days before the hearing on the petition. The fire protection district appeared at the hearing as an objector. Along with the petition, the land company and the assenting residents supplied the court an affidavit supporting the petition, as required by Illinois Revised Statutes, ch. 24, par. 7-1-4, which recited that the signatures on the petition represented a majority of the land owners of record, the owners of more than 50% of the land, and a majority of the electors (registered voters) in the Highridge area. In response to this, the fire protection district filed the affidavit of the president of the board of trustees which, in effect, denied the truth of the statements contained in petitioners' affidavit and also asserted that the land sought to be annexed was not contiguous to the City of Belleville.

Elena C. Cory testified that she and her husband owned property and lived in the area sought to be annexed; that she personally circulated the petition for annexation of the land to the people residing in the subdivision and that a majority of the record owners of the property and also a majority of the electors signed the petition.

John R. Sprague testified in substance that the St. Clair Land Company, of which he was president, had developed the subdivisions of Highwood and Highridge,

that Highwood had been annexed to the city of Belleville, that Highridge was adjacent to Highwood and that Highridge was therefore contiguous to the city of Belleville. The fire protection district as the objector, called no witnesses and offered no exhibits in evidence.

The circuit court found that the petition for annexation was signed by a majority of the land owners of record, by the owners of record of more than 50% of the land, and by a majority of the electors in the area to be annexed; it found also that the territory described in the petition was contiguous to the city of Belleville. The court therefore decreed the petition for annexation to be in conformity with the provisions of Illinois Revised Statutes, ch. 29, par. 7-1-1 through par. 7-1-4, and ordered that the matter of annexation be submitted to the corporate authorities of the city of Belleville. From this order, the fire protection district appeals.

On appeal the district argues that the evidence did not show that the territory to be annexed was contiguous to Belleville, and that the evidence did not show that the petition was signed by the requisite number of electors and land owners of record.

We find that the judgment is not against the manifest weight of the evidence, that no error of law appears, and that an opinion in this case would have no precedential value.

We therefore affirm in accordance with Supreme Court Rule 23 (Ill. Rev. Stat. ch. 110A, par. 23.).'

Judgment affirmed.

CONCUR:

Eberspacher, Crebs, JJ.

PUBLISH ABSTRACT ONLY.

Copy 1

ILL. APP. CT. UNPUB'D OPINIONS
Vol. 21, 3d Series
111773

Copy 1



APR 75



N. MANCHESTER,
INDIANA

